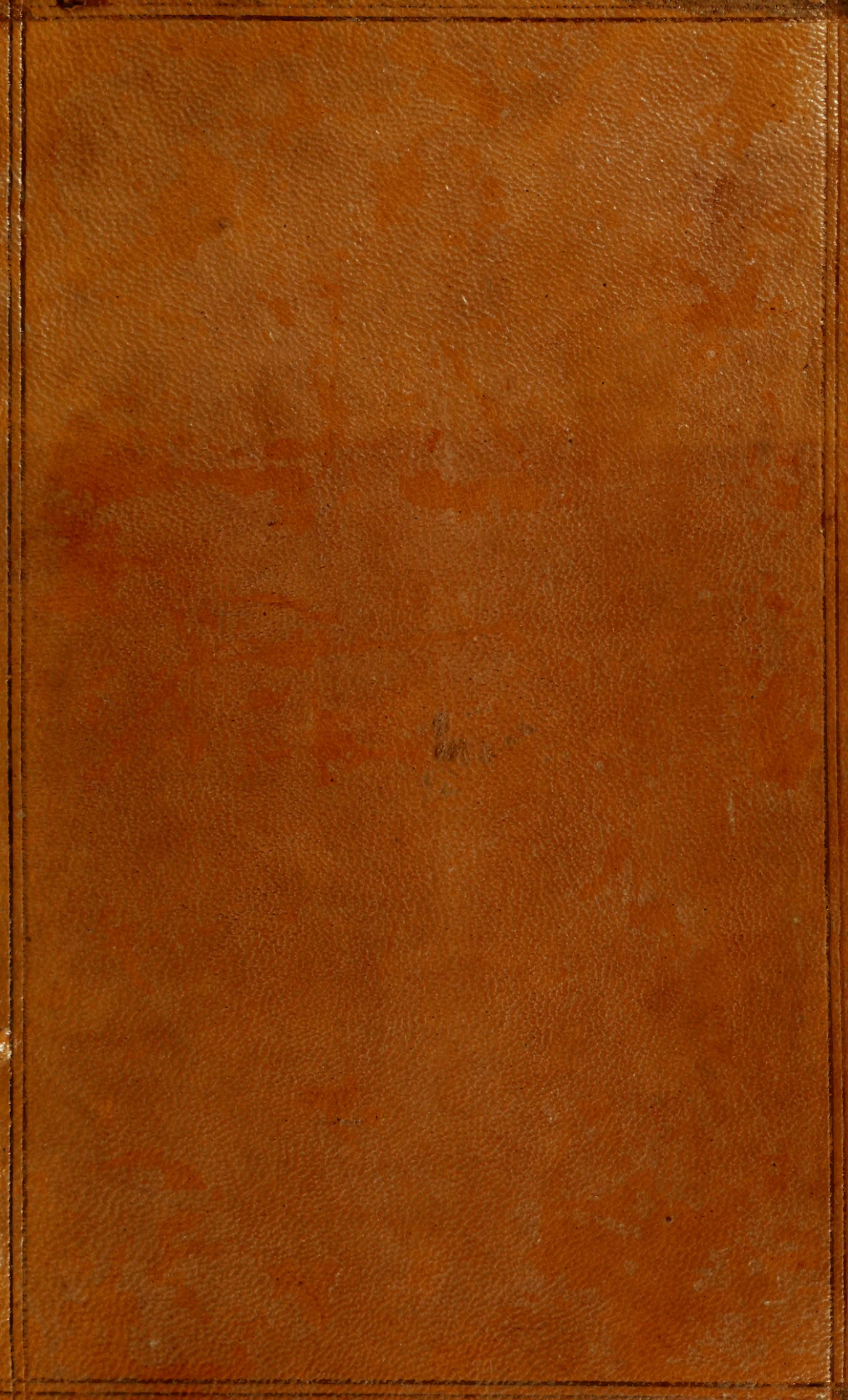




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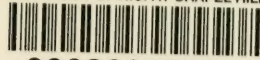
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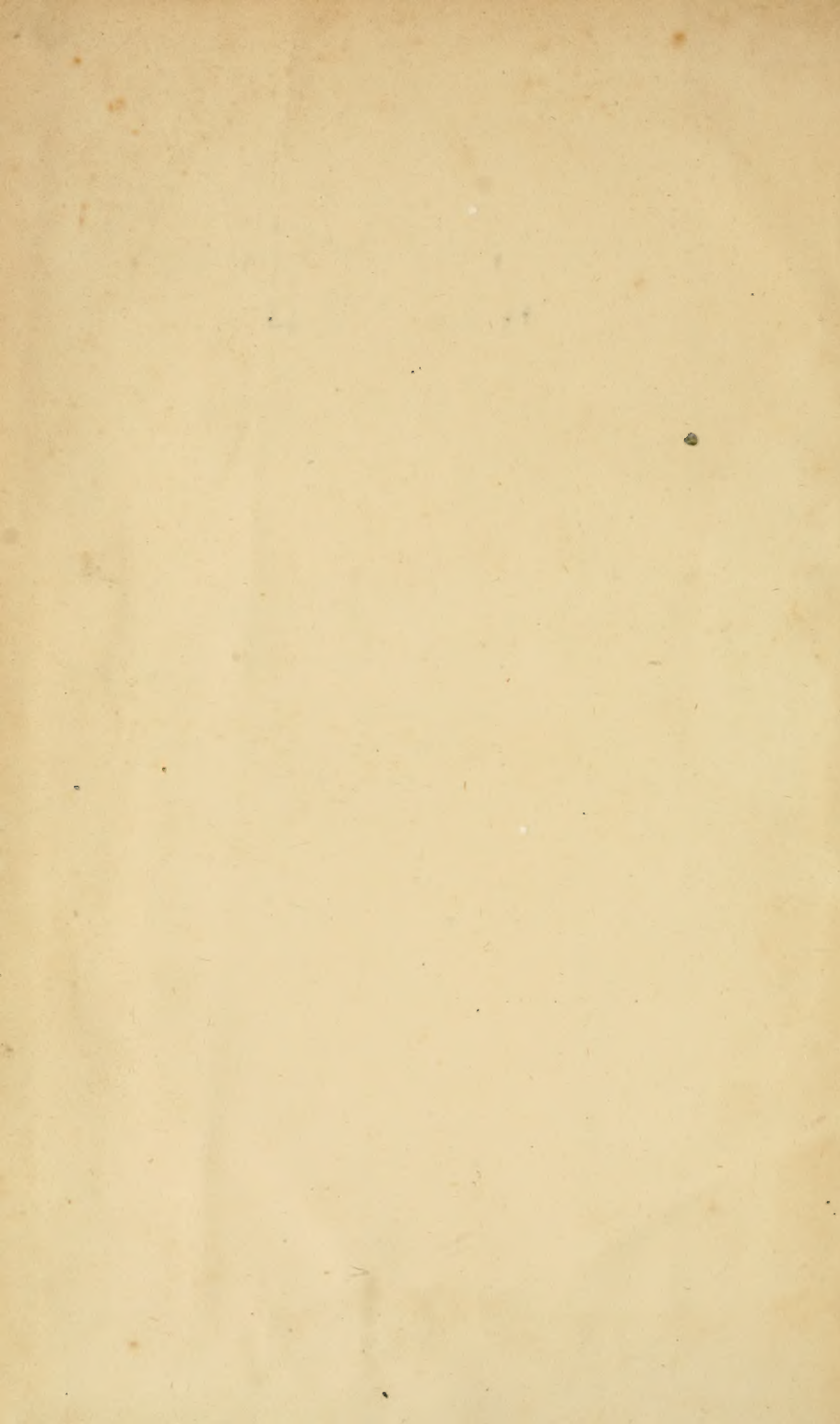


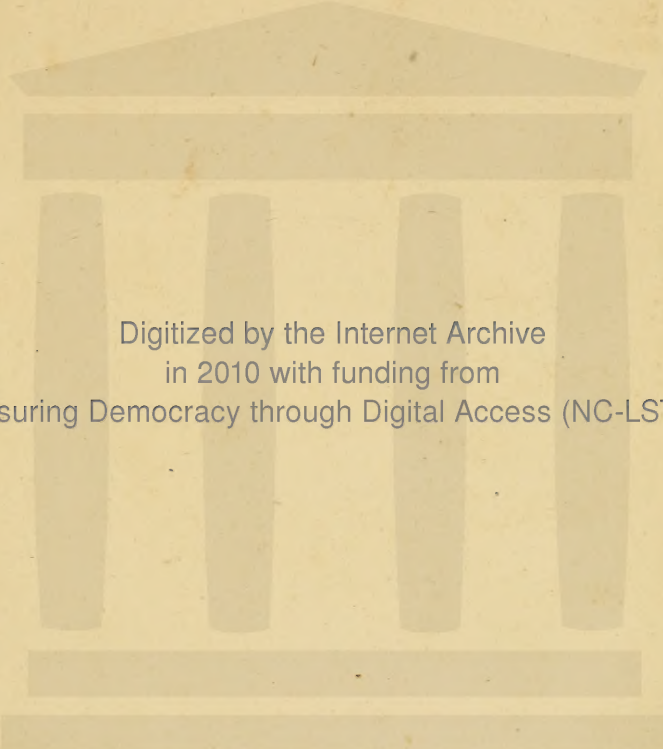
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A DIGEST

OF ALL THE REPORTED CASES,

BOTH IN LAW AND EQUITY,

DETERMINED IN THE

COURTS OF NORTH CAROLINA,

FROM THE

EARLIEST PERIOD TO THE PRESENT YEAR,

TOGETHER WITH

A TABLE OF THE NAMES OF THE CASES.

PREPARED BY

WILLIAM H. BATTLE,

A Judge of the Supreme Court.

IN THREE VOLUMES.

THE FIRST AND SECOND VOLUMES CONTAINING THE LAW, AND THE
THIRD VOLUME THE EQUITY CASES.

VOLUME II.

RALEIGH:

NICHOLS, GORMAN & NEATHERY, BOOK AND JOB PRINTERS.

1866.

DIGEST.

VOLUME II.

HABEAS CORPUS.

1. In all cases of *habeas corpus* before any judge or court, where the contest is in respect to the custody of minor children, either party may appeal, by virtue of the act of 1858, ch. 53. *Musgrove v. Kornegay*, 7 Jones, 71.

2. Where a child, over twelve years old, has been illegally detained as an apprentice, under a deed executed by the father alone, the proper order, upon a *habeas corpus*, is that the infant be discharged to go where he pleases; but where an infant, illegally detained, is under the age of twelve, the proper order is that he be restored to his father. *Ibid.*

3. The courts and judges of this state have concurrent jurisdiction with the courts and judges of the Confederate States, in the issuing of writs of *habeas corpus*, and inquiring into the causes of the detention, where such detention is by an officer or agent of the Confederate States. *In the matter of Bryan*, 1 Winston, 1.

4. The supreme court has jurisdiction to issue writs of *habeas corpus* returnable before itself, and to consider and determine on the causes of detention. *Ibid.*

5. Where the object of a writ of *habeas corpus* is to inquire, whether there be probable cause of commitment, the decision on it is not the subject of review by writ of error or *certiorari*. But where the question on the writ of *habeas corpus* is concerning the power of the committing magistrate or court, or of the legality of the commitment, the weight of authority is in favor of the doctrine that the decision is subject of review. *Walton v. Gatlin*, 1 Winst., 318.

6. The decision on a writ of *habeas corpus*, the object of which is to free a person from restraint, for any other cause than the commission of a criminal offence, is a judgment, and the subject of review by writ of error or *certiorari*. *Ibid.*

7. The supreme court has the power to review the action of

the superior courts, and of the judges in vacation, upon questions of law in all cases under the *habeas corpus* act, Rev. Code, ch. 55, sec. 10. *Ibid.*

8. A soldier actually and rightfully in the army can have no relief by the writ of *habeas corpus*, against any alleged abuse of military authority. *Cox v. Gee*, 2 Winst., 131.

9. If he be *wrongfully* held as a soldier, he is not entitled to a writ of *habeas corpus*, while he is undergoing punishment, or awaiting a trial, for a military offence. *Ibid.*

See (Contempt, 3.)

HEIRS.

1. Where there is judgment and execution against an ancestor in his life time, no *sci. fa.* is necessary against the heirs or devisees, but the execution attaches upon the land, and goes with it to whomsoever it may come. *Baker v. Long*, 1 Hay., 1, (2.)

2. Since the statute of 5 Geo. 2, ch. 7, (Rev. Code, ch. 45, sec. 2,) the same distinction exists between real and personal property as before, and lands descended to an heir are not affected by a judgment against the executor as such; they must be proceeded against by *sci. fa.* against the heir, if *plene administravit* be found for the executor. *Baker v. Webb*, 1 Hay., 43, (55.)

3. The heirs are liable in an action of debt, upon the bond of their ancestor wherein they are named, although there may be personal effects in the hands of the executors. *Long v. Baker*, 2 Hay., 128, (291.)

4. To an action against an heir on the simple contract of his ancestor, he may plead that the executor has assets. *Keais v. Shepard*, 2 Hay., 218, (390.)

5. If an heir pay debts of his ancestor, lands descended of that amount shall be deemed to have been purchased by the heir, and shall not be liable to other debts. *Gibson v. Williams*, 2 Hay., 281, (456.)

6. As to the other part of the land, it shall be charged, not according to its value at the time of the descent to the heir, but its value at the time he sold it. *Ibid.*

7. On the surplus beyond the amount paid for the ancestor, the heir shall not be liable for interest. *Ibid.*

8. Where an heir had sold lands descended before a *sci. fa.* had issued to charge them, the purchaser may, in the name of the heir, be permitted to plead to the *sci. fa.* that the executor has assets. *Hamilton v. Jones*, 2 Hay., 291, (474.)

9. If an heir plead to a *sci. fa.*, *nothing by descent or devise*, and

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it be found against him, judgment shall be *de bonis propriis*. *Hamilton v. Simms*, 2 Hay., 291, (475.)

10. Before an heir can be made liable as such, it must be shown, that to the lands descended his ancestor had a good title. *Hamilton v. Simms*, 2 Hay., 326, (496.)

11. A judgment of execution against the real estate of a deceased debtor was reversed, because it was not found that the executrix had fully administered, and had no assets, or not sufficient to satisfy the creditor's demand. *Cardwell v. Brodie*, 1 Murph., 97.

12. A judgment against the administrator creates no lien on lands descended or devised, and lands *bona fide* sold by the heir or devisee, before a *sci. fa.* sued out against him, are not liable for the debts of the deceased. *Williams v. Askeu*, 2 Murph., 28. (The law in relation to the land of a deceased debtor is greatly altered. See Rev. Code, ch. 46, sec. 46 and following.)

13. An action of debt will not lie against heirs, upon a bond in which they are not expressly named. *Taylor v. Grace*, 2 Murph., 66.

14. If lands descended, or devised, have been *bona fide* sold before a *sci. fa.* issues, to satisfy a debt of the ancestor, under a prior lien, they of course are not liable under the *sci. fa.* If sold to satisfy the heir's or devisee's own debt, the heir or devisee is personally liable, as if he himself had sold them, but the land is not liable. *Spaight v. Wade*, 2 Murph., 295, S. C. 1 Car. L. R. 284, (29.)

15. If the lands have been fraudulently sold before *sci. fa.*, and are not, in point of fact, in the hands of the heir or devisee, the lands are still liable to the demands of creditors. *Ibid.*

16. When execution issues in such cases, the plaintiff proceeds at his peril; he can sell all lands descended or devised, unless they have legally passed into other hands. *Ibid.*

17. A sale of land under a *fi. fa.*, which issued and bore *teste* after the death of the debtor dying seized, without any *sci. fa.* against his heirs or devisees, conveys no title to the purchaser. *Bowen v. McCulloch*, N. C. Term, R., 261, (684.)

18. Under the act of 1784, the heirs may plead to a *sci. fa.* to subject to sale the lands descended, that the executor had not fully administered, or that he had suffered judgment to be recovered by fraud, &c., but the "plea that the lands descended had been sold to satisfy prior judgments" is totally immaterial; and, although the jury may find it true, the plaintiff is entitled to judgment of execution against the lands descended, as if no plea had been pleaded. *Tremble v. Jones*, 3 Murph., 579.

19. The proviso in the last section of the act of 1789 does not prevent an execution from issuing under that act, and the act of 1784, where one of several heirs is a minor, but only directs that it shall not be levied on the property of the infant de-

fendant. Therefore, where judgment was obtained against several co-heirs, one of whom was an infant, *it was held* that the creditor might sue out his execution and obtain satisfaction from the hands of the adults. *Bank of Newbern v. Stanley*, 2 Dev., 476.

20. An execution against the land of an infant, under the acts of 1784 and 1789, ought to appear upon its face to have issued upon motion after a stay of twelve months, otherwise the sheriff may or may not act upon it, and he will or will not be justified by the fact; but he may levy *instantly* upon the property of the adults. *Ibid.*

21. Although satisfaction of a decree in equity, against an executor who has fully administered, can now be had out of the lands of the testator, only upon a bill against the heirs, yet a sale under an order made upon a *sci. fa.* is valid. *White v. Albertson*, 3 Dev., 241.

22. Where the heirs have land descended from both parents, a creditor cannot sell that descended from the mother, under a judgment against that descended from the father, although the mother held as devisee of the father. *Trotter v. Selby*, 3 Dev., 374.

23. A judgment on a *sci. fa.* against an heir, when his name is neither set forth in the writ, nor in the return of the sheriff, is a nullity, and a purchaser under it acquires no title. *Bonner v. Tier*, 3 Dev., 533.

24. Where a judgment was obtained against an infant heir, by *sci. fa.* under the act of 1789, with a stay of execution for one year, during which time another creditor commenced suit, and obtained judgment against the heir, on the bond of his ancestor, and issued a *fi. fa.* before the expiration of the stay, *it was held* that a purchaser under it had a better title than one under a *fi. fa.*, afterwards issued upon the first judgment. *Ricks v. Blount*, 4 Dev., 128.

25. The *proviso*, to the last section of the act of 1789, applied probably only where the guardian had sold property to pay the debt; but, at all events, it extended only to judgments upon a *sci. fa.*, not to those in debt upon the bond of the ancestor. *Ibid.*

26. Nothing but a writ in debt, or a *sci. fa.*, is "an action brought or process sued," within the act of 1789, to restrain alienation by an heir. And process against an heir created a lien upon the real estate, only as to him, and purchasers under him—not as to other creditors. *Ibid.* (The remedy against the real estate of deceased persons in favor of creditors is greatly altered. See Rev. Code, ch. 46, sec. 44, and following.)

27. Land cannot be sold under a *fi. fa.*, which issues and bears *teste* after the death of the debtor, without bringing in the heirs by *sci. fa.*; although the *fi. fa.* may be an *alias*, the original of

which issued and bore *teste* in the life time of the debtor. *Wood v. Harrison*, 1 Dev. and Bat., 356.

28. A writ from a court, commanding the sheriff to summon A and B, heirs of C deceased, to be and appear, &c., "then and there to show cause, if any, why D shall not have judgment against the lands of said deceased, in the hands of his said heirs, for \$150, besides interest and cost," is not such a *sci. fa.* as is required by the act of 1784, subjecting the real estate of a deceased person to the payment of his debts, though a debt may have been previously established against the administrator, the plea of fully administered found in his favour, judgment signed, and an award of *sci. fa.* against the heirs. *Barrow v. Arrenton*, 1 Ired., 223.

29. Such a writ does not set forth nor refer to a judgment previously rendered in any action for any person, and of course does not call on the heirs to show cause why execution on that judgment shall not issue against the lands descended to them. And, where upon the return of such a writ, judgment by default was entered upon the record, and an award of execution against the lands in the hands of the heirs, *held* that the judgment was a nullity, and that a purchaser at the sheriff's sale, under an execution issuing upon it, acquired no title. *Ibid.*

30. Although a *sci. fa.* against heirs and *terre tenants* need not name them, but leave it to the sheriff to summon and return them, yet the judgment is always against particular persons, and the writ of execution must name the same persons. *Robertson v. Woollard*, 6 Ired., 90.

31. An execution commanding the sheriff to sell the lands of A. B. "in the hands of his heirs" without naming them, is void, and a sale under it confers no title. *Ibid.*

32. A sale of land, under a *fi. fa.* bearing *teste* after the death of the defendant in the execution, where his heirs have not been made parties, is void. *State v. Pool*, 6 Ired., 288.

33. Where a judgment is against heirs for lands descended, after a plea of fully administered has been found in favor of the administrator, and the execution issues against the goods and chattels, lands and tenements of the heirs, the execution is void. *Walker v. Marshall*, 7 Ired., 1.

34. Under the statute directing that, upon judgments against infant heirs, the execution shall be stayed twelve months, the guardian of the infants has a discretion to waive the stay, and permit the execution to issue *instantly*, and the sheriff is bound to proceed under the execution. *Heath v. Latham*, 7 Ired., 10.

35. Where the plea of fully administered is found in favor of the administrator, and upon a *sci. fa.* against the heirs, they come in and plead that the administrator has assets, *it was held* that, upon the trial of the issue upon that plea, the heirs may give evidence of any assets received by the administrator, either before

or after the trial of the original suit, and up to the time of the plea pleaded to the *sci. fa.* *Carrier v. Hampton*, 11 Ired., 307.

36. The county court, on the petition of a guardian of a certain infant, passed the following order: "Ordered that he, the said W. B., guardian, sell the land of the said deceased T. H., or so much thereof as will be sufficient to discharge the debts," *it was held* that this order was unauthorized and void, and of course that a purchaser under it acquired no title. *Ducket v. Skinner*, 11 Ired., 431..

37. Though in the case of a *fi. fa.* for the sale of the lands of a deceased debtor, the heirs should be named, yet this is not necessary when the writ is a *vend. expo.*, the land having been ascertained by the levy and return of a constable. *Smith v. Bryan*, 12 Ired., 11.

38. The question who are the heirs of a deceased person is one of law to be decided by the court, and not of fact to be left to the jury. *Bradford v. Erwin*, 12 Ired., 291.

39. In a proceeding by *sci. fa.* against heirs to subject the real assets of a deceased debtor, any one of the heirs can tender a collateral issue to the administrator, and, if it found against the administrator, the creditor would have execution against him for the sum thus found in his hands, which would necessarily operate to the exoneration *pro tanto* of all the real estate descended. *Carrier v. Hampton*, 13 Ired., 436.

40. A sale of land by a guardian, under an order of the county court, which was made without the court ascertaining that there were debts of the ward making the sale necessary, and which did not designate with certainty the land intended to be sold, is void, and the purchaser acquires no title. *Spruill v. Davenport*, 3 Jones, 42.

41. An order of the county court, authorizing a guardian to sell the land of his ward, under the act of 1789, Rev. Stat., ch. 63, sec. 11, must find and adjudge that there are debts against the ward, which render a sale necessary; but the amount of the debts, to whom due, or other particular description, is not essential to the validity of the order. *Pendleton v. Trueblood*, 3 Jones, 96. (See Rev. Code, ch. 54, sec. 34.)

42. An order "to sell the land of the ward named in the petition, adjoining the lands of J. B. and others, containing about one hundred and ten acres," is a sufficient specification of the land under the act, when it appeared that the ward had no other land. *Ibid.*

43. What constitutes an heir at law is strictly a question of law; but the facts, on which the question arises, must be left to the jury. Hence, it is proper to leave it to them to say, from the testimony, whether a particular person died without children, before the act of 1784, and whether another was his eldest nephew. *Ernull v. Whitford*, 3 Jones, 474.

44. The land of an infant can be sold by an order of the county court only for the debt of his ancestor, and not for his own debt, and, to make the sale valid under an order to sell for the debt of his ancestor, there must be an adjudication of the court that there was a debt of the ancestor against the estate of the petitioner's ward. *Coffield v. McLean*, 4 Jones, 15.

45. Where a petition to sell lands, by a guardian, alleged that there was a debt of the ancestor of his ward, for which he was liable as heir, and the land was described by calling for coterminous tracts, and the court adjudged, upon the testimony of a competent witness, that the facts of the petition were true, and made an order to sell the land, *it was held* that the sale was good. *Bryan v. Manning*, 6 Jones, 334.

46. Where the guardian of one of two joint owners of land petitioned for the sale of the whole of it, without noticing the existence of the other tenant in common, *it was held* that the sale was good as to one-half the land, and the purchaser, though taking a deed for the whole, acquired title to only one-half, as tenant in common with the other owner. *Ibid.*

47. When an ancestor dies intestate, his heirs take by positive law; and the course of descents cannot be altered by words in a deed excluding particular heirs, or by any agreement of parties. *Cannon v. Nowell*, 6 Jones, 436.

48. There is no presumption of law, that a person, bearing the same name with one of the sons of a deceased owner of land, is the heir, or one of the heirs, of such deceased owner; but the question of identity is one of fact, to be determined by the jury upon the concomitant circumstances, such as the identity of name, residence of the claimant, and that of other members of the family, the price paid for the land compared with its value, and the facility with which the identity might be proved, if it existed, and other circumstances. *Freeman v. Loftis*, 6 Jones, 524.

49. The purchaser of land, sold under an order of court for the payment of debts of the deceased, on the petition of the administrator, who was also the sheriff of the county, and, as such, served the notices on the heirs at law, *was held* not to be affected by such irregularity, nor by the fact that the petition had not been sworn to, he not being a party to the proceeding. *Overton v. Crawford*, 7 Jones, 415.

See (Execution—Of void and irregular executions, and proceedings to set them aside, 13.) (Executors and Administrators—Of their liability to creditors, &c., 32.) (Judgment—Of judgments against executors, administrators and heirs, 1.) (Judgment—Of irregular, void and erroneous judgment, 11.) (Justices of the Peace—Of their jurisdiction, judgment and execution, 71-72.) (Limitations—As to real estate, 16.) (Pleading—Of *scire facias*, and the pleadings thereon, 3-7.)

HIGHWAY.

1. By the act of 1784, the interposition of a jury is necessary in the laying out, altering or changing of roads; but in deciding in the first instance whether there shall be a highway in a particular section of the county; or in discontinuing one which is useless, the jury have nothing to do, the whole power being given to the court. *Carr v. Hairston*, 1 Car. Law Repos., 249, (20.) (See Rev. Code, ch. 101, secs. 1, 2.)

2. The county courts of two adjoining counties having been authorized, by act of assembly, to appoint commissioners to lay out a road, and one J. H. having been authorized to erect toll gates on it and to take tolls, the report of the commissioners, as to the discharge of their duty, was set aside, because the person, across whose land the road was laid out, had not had notice of their proceeding. *Sawyer v. Hamilton*, 1 Murph., 253.

3. The overseer of a public road is subject to indictment, if he neglect to keep up sign boards, as directed by the act of 1784. *State v. Nicholson*, 2 Murph., 135. (See Rev. Code, ch. 34, sec. 39, and ch. 101, sec. 18.)

4. An overseer of a public road must be served with notice of his appointment ten days, before he is liable to be indicted. *State v. Everitt*, 2 Car. L. R., 633, (436.)

5. By act of the legislature, commissioners may be appointed to inspect a turnpike road, and it may be directed that, upon their report, an indictment may be instituted against the stockholders; and on the trial of the indictment, the evidence of the commissioners is admissible and sufficient, if the jury believe them, to convict the proprietors. *State v. Howorth*, 1 Hawks, 346.

6. Where water was, by the erection of a mill, thrown upon a highway, and the former owner of the mill had built bridges over the water, which, during his ownership, he repaired, and which were also repaired by the present owner, who did no other work on roads, *it was held* that the present owner was liable in damages to a person who was injured by a defect in one of the bridges, and that the enquiry was properly left to the jury, whether the mill or the road were the more ancient. *Mulholland v. Brownrig*, 2 Hawks, 349.

7. Where the proprietors of a public bridge, in order to draw travellers from a public ferry, open a private road, by the permission of the owners of the soil above the ferry, leading to the foot of the bridge, and erect a small bridge on such private road over an intervening creek, they are not indictable for any defect in the small bridge. *State v. Seawell*, 3 Hawks., 193.

8. Where a party appeals from the decision of the county court laying off a road over his lands, and the superior court

orders it to be laid off according to his wish, he shall not pay the costs of the petition. *Harris v. Coltraine*, 3 Hawks., 312.

9. The twenty days previous notice of the filing of a petition for a public road cannot be objected, by a person who has come forward and opposed the petition, continued the cause and appealed to the superior court; because his conduct shows that he had ample notice. *Little v. May*, 3 Hawks., 599.

10. A railroad company is a private corporation, its effects and emoluments being private property, but the road constructed by them will be a public highway. *Davis v. Raleigh and Gaston Railroad Company*, 2 Dev. and Bat., 451.

11. In taking private property for the use of the public, as for a public highway, the legislature is not restricted to a mere easement in the property, but may take the entire interest of the individual, if, in the opinion of the legislature, the public exigency requires it. *Ibid.*

12. If a road be established as a highway by an erroneous judgment of the county court, it will be a nuisance to obstruct it, until the judgment is reversed. It is enough that the way obstructed is a public road *de facto*, to constitute the obstruction of it a public nuisance. But where the proceedings to change a road state no road as having been prepared; nor describe where the altered road is to run, except that it is to be brought nearer a particular house; and the prayer is only that an order may be made "for turning the road," and then an entry appears that "said report was confirmed and duly entered of record," there is no sufficient judgment for establishing the road as altered, and it is no nuisance to obstruct it. *State v. Spainhour*, 2 Dev. and Bat., 547.

13. In a petition to turn a road under the act of 1834, it must appear that the road proposed to be changed, as well as that offered to be substituted, is wholly upon the land of the petitioner; the freeholders must also be sworn, and the overseer have notice. *Ibid.* (See Rev. Code, ch. 101, sec. 6.)

14. The common law mode of creating and establishing a public highway is not repealed by any of our acts of assembly. *Woolard v. McCullough*, 1 Ired., 432.

15. The *user* of a road as a public highway for twenty years, will, under the circumstances of a case, authorize a jury to presume a dedication of the road, by the proprietors of the soil, to the use of the public. *Ibid.*

16. Where a road is opened by an order of the county court, according to law in every respect, except that no damages were assessed by the jury to the owners of the land, none but those owners can impeach the order for that cause. *Ibid.*

17. An overseer of a public road can require no hands to work on his road, unless they live within a district which has been

designated for him by the county court, or unless they have been specially assigned by the court to work on his road. *Ibid.*

18. When a road has been laid off by order of a county court, and the jury have returned a report which has been confirmed and an appeal taken to the superior court, it is too late to take exceptions to the jury. The objection should have been made in the county court upon the return of the jury, by a motion to quash the proceedings of the jury. After a decision of the county court upon the merits, the superior could, upon an appeal, determine only upon the merits. *Piercy v. Morris*, 2 Ired., 168.

19. In a petition to turn or change a public road, it must be alleged that the new road is necessary, or would be more useful to the public; otherwise the petition will be dismissed. *Leath v. Summers*, 3 Ired., 108.

20. The mere appointment of an overseer and assignment of hands to a supposed road, by the county court, are not *per se* a judicial determination that a public road be laid out where none before existed. And any inhabitant so assigned, when sued for the penalty incurred for refusing to work on such road, and the overseer indicted for not having the road in order, may show that in fact there is no such public road. *Baker v. Wilson*, 3 Ired., 168.

21. Where an individual appropriates land for a public highway, much less time than twenty years will suffice to make it a public road; for it is rather the intention of the owner, than the length of time of the *user*, which must determine the fact of dedication. But a county court cannot dedicate or appoint a public road, in any other manner than that authorized by law. *State v. Marble*, 4 Ired., 318.

22. Where a road has been used by the public as a highway for twenty years, and there is no evidence how this *user* commenced, a presumption of law arises that this road has been laid off and established as a public road, by due course of law; but a possession or *user* for less time than twenty years will not raise this presumption. *Ibid.*

23. There may be a public road *de facto*, and the only person, who can question the right to such a road, is the owner of the land; and the owner can only be bound by a proceeding against him according to the law of the land, or by an *user* for twenty years, from which such proceedings will ordinarily be presumed. *Ibid.*

24. So, also, no presumption of a legal authority to erect a gate across a public road can arise, in a less time than twenty years, from the actual erection of the gate. *Ibid.*

25. Where a road has been used by the public for twenty years without obstruction or hindrance, a grant from the own-

ers of the land over which the road passes may be presumed. *State v. Hunter*, 5 Ired., 369.

26. The county court has no authority to discontinue any public road, but upon the petition of one or more persons, filed in the court, and the other necessary proceedings prescribed in the act; and any order for discontinuing a public road, made otherwise than as the act directs, is void. *State v. Shuford*, 6 Ired., 162. (See Rev. Code, ch. 101, sec. 2.)

27. The county court has full power to *order* the laying out of public roads, but none to *lay them out*, as that power is given to a jury. *Welch v. Piercy*, 7 Ired., 365.

28. The county court has the power to decide whether the public convenience requires the laying out of a road, and to order a jury for the purpose of laying it out; but it has no power, except as to the *termini*, to direct the jury, or any one else, *how* it shall run, that being the exclusive province of the jury, their verdict being, of course, subject to the judgment of the court, whether it shall be received or not. *Ibid.*

29. An order of the court directing *how* a road shall be run and opened, does not justify an overseer who acts under it, and he is liable to an action by the party aggrieved. *Ibid.*

30. Where a person resides in another state during the greater part of the year, but has a domicile in this state, in which he also resides three or four months of the year, during which he keeps slaves here, he is liable, during the time he resides in this state, to be required to send such hands to work on the public road, as are required by the act of assembly on that subject. But persons merely passing through the state, or visiting it for purposes of profit or pleasure, and remaining for days, weeks, or even months, without having any fixed home here, are not persons whom the overseers of the roads are authorized to summon as being within their districts. *Cantrell v. Pinkney*, 8 Ired., 436. (See Rev. Code, ch. 101, sec. 9.)

31. An overseer of a public road has no right at his discretion to widen the road, as this can only be done by a jury under the direction of the county court. *Small v. Eason* 11 Ired., 94.

32. In an action to recover a penalty for not working on a road in Wilkes county, laid off by commissioners under the act of 1846, ch. 100, it is necessary to show that the commissioners were duly sworn as the act directs. *Colvert v. Whittington*, 11 Ired., 278.

33. If the weather be so bad as to prevent an overseer of a road from working on it, or to render unavailing any work he might do, he ought to be excused. *State v. Small*, 11 Ired., 571.

34. Where a charter has been granted for a turnpike road, and the road has been opened, the county court has no right to convert it into a public road, unless the charter has been duly surrendered, or, from a non-user, for twenty years, a dedication to

the public may be presumed. And, even in such a case, the road can only be made a public one in the manner prescribed by statute. The mere appointment of an overseer will not be sufficient for that purpose. *State v. Johnson*, 11 Ired., 647.

35. *It seems* that the establishment of a highway may be inferred by the jury from the use of it as such for twenty years, although the time and manner of the *user* is shown to have been under imperfect and irregular legal proceedings. *State v. Cardwell*, Busb., 245.

36. By an appeal from the judgment of the county court upon a petition to lay out a public road, the superior court acquires full possession of the cause, with power to proceed to a final judgment and hearing. Therefore, when the county court dismissed such a petition, and the petitioners appealed, *it was held* that the judge of the superior court, being of opinion that the prayer of the petition ought to be granted, properly ordered a jury to lay out the road, instead of awarding a *procedendo* to the county court. *Shoffner v. Fogleman*, Busb., 280.

37. Highways are laid out for public convenience, and, therefore, should not be altered, unless the interest of the public require it. *Kenedy v. Erwin*, Busb., 387.

38. The power to exempt hands from working on the public roads is restricted to a court consisting of seven justices. *Forbes v. Hunter*, 1 Jones, 231.

39. An overseer of a public road is liable, in an action on the case, for special damages sustained by a person, on account of the road's being out of repair. *Hathaway v. Hinton*, 1 Jones, 243.

40. The establishment of a road district, or the assignment of hands to work on a public road, can only be made by an order of the county court, and no acquiescence in the authority of an overseer, by working under him upon a road, can amount to a presumption that the district was laid off, or that the person thus acquiescing had granted the power to another of compelling him to work on the road. *Tarkington v. McRae*, 2 Jones, 47.

41. It is irregular, upon the hearing of exceptions to the report of a jury ordered to lay off a public road, for the court to consider of the propriety of such order. *Anders v. Anders*, 4 Jones, 242.

42. Where it was shown that a road had been opened in consequence of an award of a church, upon a controversy between two of its members, for which the person who wanted the road was to pay the owner of the land a price in money, and that such person had used the road, as of right, for more than twenty years, *it was held* that *prima facie* it was but a private way, and that a long and general use of it by the public, in the absence of any proceeding in court to have it laid out, and overseers appointed over it, was not sufficient to change it into a public road. *Davis v. Ramsey*, 5 Jones, 236.

43. A road only one mile long, and from ten to fifteen feet wide, leading from a highway to a church, and having been used by the neighborhood for sixty years, in going to and from the church, and which connects with a country road leading to a mill and a railroad station, but which had never been under the charge of an overseer, nor worked as a public highway, is not a public highway, so as to subject a person to an indictment for obstructing it. *State v. McDaniel*, 8 Jones, 284.

44. The Rev. Code, ch. 101, sec. 15, gives to overseers of roads power to cut poles, &c., on any land adjoining his section of the road, for the purpose of making causeways, &c., and if he act in good faith, he is not confined to the land immediately adjacent to the spot where the causeway, &c., is to be made. *Collins v. Creecy*, 8 Jones, 333.

45. The inference, from evidence tending to show that a way over and through a man's land is a public road, may be rebutted by evidence of *non user* for more than twenty years. *Burgwyn v. Lockhart*, 1 Winst., 269.

See (Common Schools, 3.) (Costs—In civil proceedings, when the plaintiff pays costs, 12.) (Evidence—Records of courts; the proof and effect of them, 24.) (Indictment—In what cases an indictment will lie, 15–57–67–73–83.) (Indictment—Form and matters relating thereto, 117.) (Penal Statutes, 8–9.)

HOMICIDE.

1. A person, who was violently beaten and abused, made his escape, ran to his house eighty yards off, got a knife, ran back, and upon meeting the deceased stabbed him, *it seems* he was only guilty of manslaughter. If, upon the second meeting, the prisoner had disguised the fact of having a weapon, for the purpose of inducing the deceased to come within his reach, the killing would have been murder. The distinction between murder and manslaughter elaborately explained. *State v. Norris*, 1 Hay., 429, (495.)

2. If a free servant refuse to obey the commands of his master, and the master endeavor to exact obedience by force, and the servant offer to resist by force, and the master kill, it is neither murder nor manslaughter; *a fortior*, the law is so in the case of a slave. *State v. Weaver*, 2 Hay., 54, (216.)

3. If a prisoner be convicted of manslaughter, and the court think he is a dangerous man, it may order him to give security for his good behaviour for five years. *State v. Parish*, 2 Hay., 73, (240.)

4. If a slave violently shove a white man so that he falls, or is in danger of falling, and he rises and immediately shoots the slave, the killing is manslaughter. *State v. Piner*, 2 Hay., 79, (247.)

5. The statute of 21st James 1st, ch. 27, being repealed in this state, the concealment of the birth of a base begotten child could not be given in evidence, as a strong presumption of the murder of the child by its mother. *State v. Jeffreys*, 3 Murph., 480.

6. One convicted of wilfully killing a slave, with malice prepense, is guilty of murder, and not entitled to benefit of clergy. *State v. Scott*, 1 Hawks, 24.

7. If, after mutual altercation and abuse, one of the parties strike the other a violent blow, and they are separated for a minute, and the stricken man suddenly stab the other with a knife which he had not before shown, it will be a case of manslaughter and not murder, provided death ensues. *State v. Yarborough*, 1 Hawks, 78.

8. *Necessity* distinguishes between manslaughter and excusable homicide, and not between manslaughter and murder. *Ibid.*

9. The whole design of the act of 1817, to punish the homicide of a slave, was to make it *manslaughter*, and to punish it as such; it does not go further, and determine the degrees of the homicide, but leaves them to be determined by the common law. *State v. Tackett*, 1 Hawks, 210.

10. At common law, and between white persons, a *slight* blow will not *excuse* a homicide; nor will mere *words extenuate* it to manslaughter. A blow amounts to a legal provocation, though it does not threaten death; and if he, on whom an assault is made with violence, or circumstances of indignity, resent it immediately, by killing the aggressor, and act therein in heat of blood, and under that provocation, it is but manslaughter. *Ibid.*

11. The general rule may be laid down, "that words are not, but blows are, a sufficient provocation to lessen the crime of homicide to manslaughter." From this, there are a few exceptions depending upon peculiar circumstances. *Ibid.*

12. But it exists in the very nature of slavery, that the relation between a white man and a slave is different from that between free persons; and therefore many acts will extenuate the homicide of a slave, which would not constitute a legal provocation if done by a white person. *Ibid.*

13. A killing on a sudden quarrel, to avoid a great bodily harm, is a homicide under circumstances of legal provocation, and though such circumstances cannot justify or excuse the act, yet, on account of human frailty, it shall be deemed no more than manslaughter. *State v. Roberts*, 1 Hawks, 349.

14. A well grounded belief, that a known felony is about to be committed, will extenuate a homicide committed to prevent

the felony, but not a homicide committed in pursuit, by an individual, of his own accord. *State v. Rutherford*, 1 Hawks, 457.

15. If death do not take place within a year and a day of the time when a wound was inflicted, the law draws the conclusion that it was not the cause of the death, and this cannot be contradicted. *State v. Orrell*, 1 Dev., 139.

16. A homicide may be justified when it takes place to prevent a threatened felony, but not when inflicted as a punishment for one already committed. *State v. Roane*, 2 Dev., 58.

17. To justify the homicide of a felon in endeavoring to arrest him, the slayer must show not only a felony actually committed, but also, that he avowed his object, and that the felon refused to submit, and that the killing was necessary to make the arrest. *Ibid.*

18. Provoking language does not justify a blow, and if one be struck with an instrument calculated to produce death, the slayer is guilty of murder. *State v. Merrill*, 2 Dev., 269.

19. Malice is presumed from the nature of the instrument, and from the want of legal provocation, and it is a matter of indifference whether the temper of the prisoner be mild or violent, and it is erroneous to permit evidence to be given, by the State, of such temper. *Ibid.*

20. If an apprentice fly from the chastisement of his master, who pursues him with unlawful violence, and, in the pursuit, is killed, the apprentice is not guilty of murder. So of a person guilty of a misdemeanor, flying from an officer. *State v. Will*, 1 Dev. and Bat., 121.

21. It is not the criterion of a legal provocation that the offensive act is an indictable offence. *Ibid.*

22. If one man assails another, and is about to commit an unauthorized act of violence upon him, and a third person interposes to prevent it, and is killed by the assailant, it is murder. *State v. Benton*, 2 Dev. and Bat., 196.

23. Where one goes to the house of another in a peaceable manner, without offering or threatening violence to his person or dwelling, and, upon being ordered off and not going immediately, is killed by the owner of the premises, the slayer is guilty of murder, although it be proved that he had previously forbidden the deceased from coming on his premises. *State v. Smith*, 3 Dev. and Bat., 117.

24. It is ordinarily true, that an actual intent to kill is involved in the idea of murder. But it is not always so. If great bodily harm be intended, and that can be gathered from the nature of the means used, or other circumstances, and death ensue, the party will be guilty of murder, although he may not have intended death. *State v. Hoover*, 4 Dev. and Bat., 365.

25. When a man makes an assault, which is returned with a violence manifestly disproportionate to that of the assault, the

character of the combat is essentially changed, and the assaulted becomes in his turn the assailant; and if the person who made the first assault, in the transport of passion thus excited, and without previous malice, kill his adversary, the proper inquiry as to the degree of his guilt is not, whether he was possessed of deliberation or reflection, so as to be sensible of what he was then about to do, and intentionally did the act, but whether a sufficient time had elapsed after the violent assault upon him, and before he gave the mortal wound, for passion to subside, and reason to re-assume her sway; for if there had not, he would be guilty of manslaughter only. *State v. Hill*, 4 Dev. and Bat., 491.

26. If a man assault another with malice prepense, even though he should be driven to the wall, and kill his adversary there to save his own life, he is guilty of murder. *Ibid.*

27. Where two persons have formerly fought on malice, and are apparently reconciled, and fight again on a fresh quarrel, it shall not be intended that they were moved by the old grudge, unless it so appear from the circumstances of the affair. *Ibid.*

28. If one began an affray, or even if he did not begin, but was assaulted first, and then a combat ensued, he could not *excuse* himself as for killing in self defence, unless he quitted the combat before the mortal blow was given, (if the fierceness of his adversary permitted,) and retreated as far as he might with safety, and had then killed his adversary of necessity to save his own life. *Ibid.*

29. Words of reproach, or contemptuous gestures, or the like offences against decorum, are not a sufficient provocation to free a party killing from the guilt of murder, where he uses a deadly weapon, or manifests an intention to do great bodily harm. This rule, however, does not obtain where, because of such insufficient provocation, the parties become suddenly heated, and engage in mortal combat, fighting upon equal terms. *Ibid.*

30. Although there be a legal provocation, yet a homicide will be murder, if committed under such circumstances of cruelty as manifest the thoroughly wicked heart. And cruelty, when the *facts*, from which it is to be inferred, all distinctly appear, is an inference of law, and, therefore, properly drawn by the court. But where no more is stated than, that several blows were struck with a stick of curled hickory, of the ordinary size, and with the larger end thereof, without stating more of the nature of those blows than that one of them was mortal, the facts are not so set forth as to leave the question as one for legal inference. *State v. Jarrott*, 1 Ired., 76.

31. If the weapon, with which the homicide was committed, were not of the character called deadly, that is, likely to produce death or great bodily harm, the homicide would not be murder, although committed without legal provocation. And there are

many cases in which the court can distinctly see, from the nature of the instrument used, whether it be of a deadly character or not; and therefore need not that the jury should directly find the fact for their information. But where it only appears that the weapon used was a stick of curled hickory of the ordinary size, and that the slayer struck with the larger end thereof, it falls peculiarly in the province of the jury to ascertain whether such a weapon, so used by the slayer, was likely to produce fatal consequences. *Ibid.*

32. When a deliberate purpose to kill or do great bodily harm is ascertained, and there is a consequent unlawful act of killing, the provocation, whatever it may be, which immediately precedes the act, is to be thrown out of the case and goes for nothing, unless it can be shown that this purpose was abandoned before the act was done. *State v. Johnson*, 1 Ired., 354.

33. There is no such thing in law as the killing with malice, and also upon the *furor brevis* of passion; and provocation furnishes no extenuation unless it produces passion. Malice excludes passion. Passion presupposes the absence of malice. In law they cannot co-exist. *Ibid.*

34. When the existence of deliberate malice in the slayer is once ascertained, its continuance, down to the perpetration of the meditated act, must be presumed, until there is evidence to repel it. There must be some evidence to show that the wicked purpose had been abandoned. *Ibid.*

35. Provocation never disproves malice; it only removes the presumption of malice, which the law raises without proof. A malicious killing is murder, however gross the provocation. *Ibid.*

36. If A, from previous angry feelings, on meeting with B, strike him with a whip, with a view of inducing B to draw a pistol, or believing he will do so in resentment of the insult, and determines, if he does so, to shoot him as soon as he draws, and B does draw, and A immediately shoots and kills him, it is a case of murder. *State v. Martin*, 2 Ired., 101.

37. It is not error in the judge to tell the jury, on a trial for murder, that "if they believed from the evidence, that the prisoner had malice against the deceased, on the morning of the day when the killing occurred, and there was no evidence that such malice was abandoned, even if the prisoner accidentally fell in with the deceased, the question of manslaughter could not arise, as the malice would exclude provocation;" it being clear, from the context of the charge, that the malice spoken of was the purpose to kill, or do great bodily harm to the deceased. *State v. Tilly*, 3 Ired., 424.

38. Although one person may not go in search of, or lie in wait for, another whom he kills, yet if he have formed the purpose to kill him, and, within a short time after forming and avowing such purpose, he, duly armed, meets the other by chance,

whether in public or in secret, and slays him immediately, there is a presumption that he did it on the previous purpose and grudge, if there be no evidence of a change of purpose. *Ibid.*

39. If one seek another and enter into a fight with him, with the purpose, under the pretense of fighting, to stab him, and he do so and kill him, it will be clearly murder in the assailant, no matter what provocation was apparently then given, or how high the assailant's passion rose during the combat; for the malice is express. *State v. Love*, 4 Ired., 113.

40. In a case of homicide, where it appeared that the deceased had threatened the prisoner about three weeks before, that he would kill him; that they met in the street in a starlight night when they could see each other; that the deceased pressed for a fight, but the prisoner retreated a short distance; that when the deceased overtook him, the prisoner stabbed him with some sharp instrument which caused his death, and that, at the time of this meeting, the deceased had no deadly weapon, *it was held* to be a case of murder. *State v. Scott*, 4 Ired., 409.

41. In a case like the above, to mitigate the offence from murder, it must appear, from the previous threats and the circumstances attending the rencountre, that the killing was in self-defence. *Ibid.*

42. Where the deceased intended only a fight without weapons, and that was known to the prisoner, and the prisoner drew his knife without notice to the deceased, even if they actually engaged in the fight, the stabbing of the deceased by the prisoner would be murder. *Ibid.*

43. The belief, that a person designs to kill me, will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately. *Ibid.*

44. On a trial for murder, the question of provocation is proper for the decision of the court; for whether certain facts amount to a sufficient provocation to palliate a killing from murder to manslaughter, is entirely a question of law. *State v. Craton*, 6 Ired., 164.

45. When a man is *unlawfully* restrained of his liberty, and kills the aggressor, the offence is only manslaughter, unless attended with circumstances of great cruelty and barbarity. But when the restraint is upon one man by another, so far as to prevent the former from doing what the latter may lawfully resist his doing, and the person restrained in that manner and for that cause kills the other, it is murder. Thus, if a husband use compulsion, as he may lawfully do, to regain the possession of his wife from one who, he has reason to suspect, has committed, or is about to commit, adultery with her, and the husband be killed in the attempt by the wrongdoer, it will be murder. *Ibid.*

46. Whether an instrument, by which death is caused, if it be in fact as described by the testimony, be one by which death may or may not be probably caused, is a question of general reason, and therefore proper for the court; and if it be doubtful, whether it would probably cause death, the court should direct a conviction for manslaughter only. *Ibid.*

47. Nothing, short of a husband's finding a man in the very act of adultery with his wife, will extenuate the killing of the adulterer from murder to manslaughter. Hence, it is not admissible, because immaterial, to prove that the deceased had been in the habit of committing adultery with the wife of the prisoner. *State v. John*, 8 Ired., 330.

48. Voluntary drunkenness will not excuse, or extenuate, a homicide committed by a man, otherwise sane, while acting under its influence. *Ibid.*

49. It is perfectly settled that no words or gestures, nor any thing less than the indignity of a battery, or an assault at least, will extenuate a killing to manslaughter; and, to constitute an assault, there must be an attempt or offer to strike, by one within striking distance. *State v. Barfield*, 8 Ired., 344.

50. The question, whether the weapon, with which a homicide has been committed, is a deadly one or not, is for the court, and not for the jury. *State v. Collins*, 8 Ired., 407.

51. In an indictment for homicide, it is the province and duty of the court to inform the jury, upon the supposition of the truth of the facts, as being agreed on or found by the jury, what the degree of homicide is. *State v. Hildreth*, 9 Ired., 429.

52. Where persons fight on fair terms, and after an interval, blows having been given, a party draws, in the heat of blood, a deadly instrument, and inflicts a mortal injury, it is manslaughter only; but if a party enter a contest, dangerously armed, and fight under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder. *Ibid.*

53. If one, who is present and sees that a felonious homicide is about to be committed, in no manner interferes, he does not thereby participate in the felony committed. Every person may, upon such an occasion, interfere to prevent, if he can, the perpetration of the felony, but he is not bound to do so at the peril, otherwise, of partaking of the guilt. It is necessary, in order to make him an aider and abetter, that he should do or say something, showing his consent to the felonious purpose, and contributing to its execution. *State v. Hildreth*, 9 Ired., 440.

54. Upon a quarrel, one of the parties retreated about fifty yards, apparently with a desire of avoiding a conflict; the other party pursued with his arm uplifted, and when he reached his opponent, stabbed and killed him, the latter having stopped and first struck with his fist. *It was held* that this was a clear case of murder. *State v. Howell*, 9 Ired 485.

55. Whenever there is a reasonable ground to believe that there is a design to destroy life, to rob, &c., a killing to arrest such design is justifiable; but it is for the jury, and not for the prisoner, to judge of the reasonableness of such apprehension. *State v. Harris*, 1 Jones 190.

56. Where the wound is adequate and calculated to produce death, it is no excuse to show that had proper caution and attention been given, a recovery might have ensued. Neglect or maltreatment will not excuse, except in cases where doubt exists as to the character of the wound. *State v. Baker*, 1 Jones 267.

57. If, after words of anger, the slayer took up an axe and approached the deceased with intent to kill him, or do him some great bodily harm, and the deceased had sufficient reasons for believing that such was his intention, he had a right to strike in self-defence, although the assailant was not sufficiently near to strike him, and such striking by the deceased would not amount to a legal provocation, to mitigate the killing to manslaughter. *Ibid.*

58. Where one strikes another a violent blow, with a heavy pole pointed with iron, and a fight ensues in which the person assailed uses a deadly weapon, with which he knocks down his adversary and disables him, and follows up his blows with great violence and cruelty until he kills him; this, on account of the greatness of the provocation offered by the deceased in the first instance, is but manslaughter. *State v. Curry*, 1 Jones, 280.

59. The doctrine of killing upon provocation discussed, and the distinctions pointed out between the circumstances when such killing will be murder, and when it will be only manslaughter. *Ibid.*

60. A mere grudge, or malice in its general sense, is not sufficient to bring a case within the rule which refers the killing to antecedent malice, rather than to an immediate provocation. In order to have that effect, there must be a *particular and indefinite intent to kill*, as if the weapon with which the party intends to kill be shown, and the time and place are fixed on, and the party goes to the place at the time, for the purpose of meeting his adversary, with the intent to kill him; for in such case there is in law a presumption of malice until it is rebutted by the accused. But where the slayer bears malice against his adversary and they meet by accident and a quarrel ensues, during which the adversary strikes the slayer with a grubbing hoe, whereupon he is shot and killed with a pistol, the rule of referring the homicide to the motive of a previous malice will not apply. *State v. Johnson*, 2 Jones, 247.

61. Where a killing, which would have been manslaughter by reason of having been done on legal provocation, is nevertheless insisted to be murder because of the *unusual manner* in which

the homicide was committed, if there be several aspects, in which the alleged unusual manner may be viewed as qualifying the motive of the prisoner, some of which are favorable and others not, it is error in the court to submit to the jury only the unfavorable views. *State v. Gentry*, 2 Jones, 406.

62. Where the *unusual* circumstance relied on, as aggravating the case from manslaughter to murder, was that the prisoner *put his knife open in his pocket*, and the court charged the jury that if the prisoner put his knife open in his pocket, and advanced to meet the prisoner with a view to a rencounter, and with the intent to use the knife, not in self-defence but with the design to take the life of the deceased, and he did so use his knife in killing deceased, it was murder; *it was held* that the judge ought also to have charged them, that if the prisoner put his knife open in his pocket without thinking of it, or with the view to use it only in the event of its being necessary to do so in self-defence, then the killing was only manslaughter. *Ibid.*

63. If a husband slay a man in the very act of adultery with his wife, it is only manslaughter; but if he slay him because the deceased had before that time committed adultery with his wife, or because he believed the deceased was going off with her to commit the act, it is murder. *State v. Samuel*, 3 Jones, 74.

64. In a trial for murder, where the homicide is clearly established or admitted, every matter of excuse, mitigation or justification, must be shown by the prisoner, and he has no right to an instruction from the court, that, unless the jury are satisfied beyond a reasonable doubt that the case is murder, they must find it to be manslaughter. *State v. Johnson*, 3 Jones, 266.

65. If a man deliberately kill another to prevent a mere trespass on his property, whether it could have been otherwise prevented or not, he is guilty of murder. *Stace v. McDonald*, 4 Jones, 19.

66. Though a person may engage in a fight willingly, yet, if in its progress, he be "sorely pressed," that is, put to the wall, so that he must be killed or suffer great bodily harm, unless he kill his adversary, and under such circumstances he does kill, it is excusable homicide. *State v. Ingold*, 4 Jones, 216.

67. Where the prisoner and deceased were friendly, and being together at a certain place, the prisoner mounted his horse for the purpose of going home, when the deceased seized the reins and held them forcibly for from ten to forty-five minutes, in spite of the efforts of the prisoner to get loose, whereupon the prisoner dismounted and struck the deceased with a jug full of molasses, (which he had casually in hands.) several blows, which proved fatal, *it was held* that the killing was a case of manslaughter and not murder. *State v. Ramsey*, 5 Jones, 195.

68. A person, who has inflicted a mortal blow, cannot be convicted of a homicide, if the wounded man were in fact subse-

quently killed by another, having no understanding or connection with the first. *State v. Scates*, 5 Jones, 420.

69. Where it appeared that two persons had formed the design to wrongfully assail a third, and one of them, in furtherance of such design, with a deadly weapon and without provocation, did assail and kill him, *it was held* that both were guilty of murder. *State v. Simmons*, 6 Jones, 21.

70. Where it appeared that the prisoner had prepared a deadly weapon with an intention to use it, in case he got into a fight with the deceased, and went to a particular place for the purpose of meeting with him, and of having a conflict with him, *it was held* to be murder, and not manslaughter. *State v. Hogue*, 6 Jones, 381.

71. If two men engage in a fight mutually and suddenly, and one kills with a deadly weapon, it is but manslaughter, and, ordinarily, it is not material which makes the first assault. *State v. Floyd*, 6 Jones, 392.

72. The fact that the prisoner was informed, or believed that the deceased committed a rape upon his wife, or committed adultery with her, will not extenuate a homicide from murder to manslaughter. He must find the deceased in the very act, and kill him immediately, to have that effect. *State v. Neville*, 6 Jones, 423.

73. On an indictment for murder, the question whether the instrument, or weapon used, was a deadly one, is for the court. The instrument may be deadly or not, according to the mode of using it, or the subject on which it is used. And the effects produced by the instrument may aid in determining its character, and in showing that the person who used it ought to have been aware of the danger of thus using it. Hence, *it was held* that an oaken staff near three feet long, of the diameter of nearly two inches, with which three blows were stricken upon the head of a man while drunk and helpless, shattering the bones of the head and rupturing the interior vessels of the brain, was a deadly weapon, and the killing by the use of it was murder. *State v. West*, 6 Jones, 505.

74. A blow need not endanger the life of the prisoner in order to make it amount to a legal provocation. *State v. Sizemore*, 7 Jones, 206.

75. The time, intervening between the receiving of a legal provocation and the striking of the mortal blow, is a question of law, and it is error to submit it to the jury. *Ibid.*

76. If a person deliberately kill another, to prevent a mere trespass upon property, he is guilty of murder. *State v. Brandon*, 8 Jones, 463.

77. Where a defendant in a State's warrant, which charged a misdemeanor, put himself in armed resistance to the officer having the warrant, and the officer, in the attempt to take the de-

feudant, slew him, without resorting to unnecessary violence, *it was held* that he was justified. *State v. Garrett*, 1 Winst., 144.

78. The principle of self-defence does not apply to the case of one, who puts himself in the posture of armed defiance to the process of the State. *Ibid.*

79. One who is not a regular officer, but to whom a State's warrant is specially directed, is bound to show it, and to read it if required; but where the defendant in such warrant had notice of the process, was fully aware of its contents, and had made up his mind before hand to resist its execution, *it was held* that the officer did not become a trespasser *ab initio* by refusing to produce his warrant on demand, so as to justify the defendant in resisting its execution. *Ibid.*

80. If two men fight, on a sudden quarrel, with deadly weapons, and one strike the other a mortal blow before the person so stricken is prepared to use his weapon, the killing is murder; and so it is *if any unfair advantage* be taken, and if one use a knife and the other a stick or a pistol, they do not fight *fairly* and on *equal terms*, and, therefore, the party killing is guilty of murder. *State v. Ellick*, 2 Winst., 56.

81. If an indictment for murder charge that A killed the deceased, and that others were present aiding and abetting, and it is proved that the deceased was killed by some one with whom A was acting in concert, and that A was present aiding and assisting, the proof sustains the charge, and the jury should be instructed to find A guilty of murder. *State v. Cockman*, 2 Winst., 95.

82. If several armed men go to a dwelling house in the night time, for the purpose of seizing the owner, without lawful authority, and one of them be killed by the owner to prevent the execution of their purpose, such killing is not murder. *State v. Medlin*, 2 Winst., 99.

See (Assault and Battery, 5-12.) (Indictment and matters relating thereto, 1-8-13-14-15-27-32-43-53-54-66-89-110-111-119-126-138-139-157-163.) (Indictment—Of the trial, verdict and judgment, 7-18-22-26-29-30-31-50-51-54-74-80-81-84-103-107.) (Indictment—Variance between the allegations and proof, 6-12.) (Evidence—In criminal proceedings and indictments, 9-22-32-52-53-69-71-72-73-76-77-78-80-81-83-84-85-87-88-90-95-97-98-101-104-109-110-111-116-117-122-124.)

HOTCHPOT.

1. Where a deviser purchased land after making his will, and gave a portion of them to one of his children in his life time, and died without having disposed of the residue, *it was held* that the land advanced to that child must be brought into hotchpot,

in the division of the undisposed of land among the devisors' children, and the land advanced must be valued at its worth at the time of the gift, and the land to be divided according to its value at the ancestor's death. *Toomer v. Toomer*, 2 Hay., 368, (563,) and 375, (573,) S. C. 1 Murph., 93.

2. Where an intestate had, in his life time, conveyed one tract of land to one of his daughters and her heirs, one to her husband and his heirs, and another to the daughter and her husband and their heirs, one of the deeds purporting to be for natural love and affection, one for a small pecuniary consideration, and one for natural love and five shillings, *it was held* that the land conveyed to the husband alone was not to be brought into hotchpot; but that the land conveyed to the wife alone, and one-half of that conveyed to the husband and wife were to be so brought. *Jones v. Spaight*, 2 Murph., 89.

3. Lands advanced to a child in the life time of the parent are not to be brought into account, in the settlement and distribution of the personal property of the parent, after his death. *Jones v. Jones*, 2 Murph., 150. *S. P. Wilson v. Hightower*, 3 Hawks, 76. (Altered, see Rev. Code, ch. 38, sec. 1, Rule 2 and ch. 64, sec. 2.)

4. Where a testator died, leaving one tract of land undisposed of, and leaving a daughter to whom he had given no land but a full share of his personal estate, the other sons and daughters, if they claim a share of the land so undisposed of, must bring into hotchpot all the land settled upon them by the testator, either by deed or devise. *Norwood v. Branch*, 2 Car. L. R., 598, (400.)

See (Distribution, 2-10-20-21.)

HUSBAND AND WIFE.

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| I. Of marriage. | VI. Of marriage settlements and agreements. |
| II. Husband's interest in his wife's person. | VII. Of actions by, and against, husband and wife. |
| III. Husband's interest in his wife's estate during coverture, and after death, as survivor. | VIII. How far the husband is bound by the acts and admissions of his wife, before and after marriage. |
| IV. Conveyance of real estate to husband and wife. | IX. Of the liability of a wife for her own acts during coverture. |
| V. Conveyance by husband and wife. | |

I. OF MARRIAGE.

1. Oral evidence of cohabitation is admissible as evidence of marriage. *Whitehead v. Clinch*, 2 Hay., 3, (146.)

2. General reputation and cohabitation are evidence of mar-

riage in all cases, except in actions of *crim. con.* *Weaver v. Cryer*, 1 Dev., 337.

3. Where a husband sues for an injury to his marital rights, he must prove the solemnization of the marriage; but in those cases in which *ne unques accouple* is not a proper plea, the marriage may be inferred from circumstances. *Brinegar v. Chaffin*, 3 Dev., 108.

4. The marriage of slaves in this state consists only of cohabitation by the consent of the owners, and does not constitute the relation of husband and wife, so as to attach to them the privileges and disabilities incident to that relation by the common law. *State v. Samuel*, 2 Dev. and Bat., 177.

5. Marriage is in law complete, when parties able to contract and willing to contract have actually contracted to be man and wife, in the forms and with the solemnities required by law. Consummation by carnal knowledge is not necessary to its validity. *State v. Patterson*, 2 Ired., 346.

6. Where a marriage is solemnized in another state, in the manner prescribed by the laws of this state, the court must intend such a marriage to be good, unless the contrary be shown. *Ibid.*

7. The act, prohibiting marriages between white persons and persons of color, includes in the latter class all who are descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person. *State v. Watters*, 3 Ired., 455. (The Rev. Code, ch. 68, sec. 7, says "free negro or free person of color to the third generation.")

8. Where a marriage is celebrated between persons, one of whom has no capacity to contract marriage at all, as where there is want of age or understanding, or a prior marriage still subsisting, the marriage is void absolutely and from the beginning; and, as between the parties themselves and those claiming under them, no rights whatever are acquired by such marriage. And whether a marriage was void or not, may be enquired into by any court, in which rights are asserted under it, although the parties to the marriage be dead. *Gathings v. Williams*, 5 Ired., 487.

9. Where husband and wife are domiciled in this state, and the husband obtains a divorce from the bonds of matrimony on account of her adultery, and she then goes into another state while her late husband is living, and there marries another man in evasion of the laws of this state, which prohibit her from marrying again, such marriage is null and void to all purposes. *Williams v. Oates*, 5 Ired., 535.

10. It is not necessary to the validity of a marriage that the parties should have obtained a license from the clerk of the county court. The omission of the license only subjects the minister, or justice, performing the ceremony to a penalty. *State v. Robins*, 6 Ired., 23.

11. It is sufficient proof of a marriage that the ceremony was performed by one, who was in the known enjoyment of the office of a justice of the peace, and notoriously acting as such. It is not necessary to produce his commission from the governor. *Ibid.*

12. The words "the cure of souls" used in the marriage act, Rev. Stat., ch. 71, do not imply a necessity that the minister should be the incumbent of a church living, or the pastor of any congregation or congregations in particular; but they do imply that the person is to be something more than a minister merely, and that he has the faculty, according to the constitution of his church, to celebrate the rights of matrimony, and to some extent, at least, has the power to administer the christian sacraments. And when a marriage is claimed to have been made by a minister, the extent of his authority for that purpose should appear. *State v. Bray*, 13 Ired., 289. (See Rev. Code, ch. 68, sec. 1, where the words having "the cure of souls" is omitted.)

13. The act of 1838, ch. 24, declaring void all marriages between white persons and free negroes and persons of color, includes only cases where such persons of color are within the third degree. Hence, where in an indictment for fornication against A and B, who had been married, it appeared that one of the defendants was of Indian blood, but of what degree was not proved, *it was held* that the parties could not be convicted. *State v. Melton*, Busb., 49. (See Rev. Code, ch. 68, sec. 7.)

14. If one marry an infant female under fifteen years of age, without the consent of her father or guardian, the forfeiture, under the act of 1820, does not arise from the offence simply, but from that and a conviction therefor in due time. *Ludwick v. Stafford*, 6 Jones, 109. (The law is now altered, so that the forfeiture accrues immediately upon the commission of the offence. See Rev. Code, ch. 68, sec. 10 and 11.)

15. A male and female slave intermarried with the consent of the owners, in the form usual among slaves; afterwards the male slave was duly emancipated and purchased his wife, and after that they had one child; the female slave was then emancipated, and without any further marriage ceremony they continued to live together and had several other children; the female then died and the male married in due form a free woman, by whom he also had children; and *it was held* that there was no legal marriage between the man and his first wife, and, consequently, her children were illegitimate, and could not inherit upon the death of their father, as tenants in common with his legitimate children by his second wife. *Howard v. Howard*, 6 Jones, 235.

16. The 12th section of the 68th chapter of the Revised Code (concerning marriage,) which requires a certificate in case the parent or guardian of a female lives out of the State, before a

marriage license shall be issued, is not confined to females under fifteen, but applies to all under twenty one years of age. *Caroon v. Rogers*, 6 Jones, 240.

17. The penalty of \$1,000, given by the 13th section of the same act against a clerk who wrongfully issues a license, cannot be recovered in the name of the father of the infant female, but must be sued for in the name of the State. *Ibid*.

18. Where at the time of a marriage the female was under the age of fourteen, and the parties continued to live together as man and wife, after she had attained that age, *it was held* that there was nothing in the Rev. Code, ch. 68, sec. 14, to abrogate the principle of the common law, and that such living together as man and wife, after the age of consent established by the act referred to, amounted to a confirmation of the marriage. *Koonce v. Wallace*, 7 Jones, 194.

See (Evidence—Hearsay and common reputation, 3-10-16-17.) (Indictment—When an indictment will lie, 37-59.) (Indictment—Limitation of time within which an indictment will lie, 3-4-5.)

II. HUSBAND'S INTEREST IN HIS WIFE'S PERSON.

See (Action on the case—When case will or will not lie, 18.)

III. HUSBAND'S INTEREST IN HIS WIFE'S ESTATE DURING COVERTURE, AND AFTER HER DEATH, AS SURVIVOR.

1. A note given to a married woman, living separate from her husband, becomes his at once, without his assent. *Swann v. Gauge*, 1 Hay., 3, (5.)

2. After the death of the wife, if the husband die before taking administration upon her *choses in action*, her administrator, and not his, is the proper person to sue for and distribute them; but he must account to the husband's administrator for all he receives, above what will pay her debts—the husband being entitled as next of kin to the wife. *Whitbie v. Frazier*, 1 Hay., 275, (317.)

3. Slaves, in whom the wife has a remainder, vest in the husband, though he dies during the coverture, without having reduced them into possession. *Lewis v. Hynes*, 1 Hay., 278, (320.) See *contra*, *Hynes v. Lewis*. Tay., 44, (33.) *Neal v. Haddock*, 2 Hay., 183, (383.) *Moye v. —*, *Ibid*, 186, (387.) *Neal v. Haddock*, Conf. Rep., 75, (207.) *McCallop v. Blount*, *Ibid*, 96, (227.) *Ideo quere!* and see *Knight v. Leake*, 2 Dev. and Bat., 133.

4. Where a tenant for life bequeathed one-half of the emblements, to which she was entitled, to her daughter, and left an executor, who, after reaping and housing the crop, married the daughter, but died before he had sold or otherwise disposed of

it, *le'd* that his possession of the crop was only as executor, and that, upon his death, his wife, and not his administrator, was entitled to it. *Berry McAlister*, Conf. Rep., 100, (231.)

5. Upon the marriage of a *feme sole*, a life estate in a chattel, reserved by a deed of gift made by her, when sole, to her son, becomes vested in her husband. *Black v. Beatty*, 2 Murph., 240. S. C., 1 Car. L. R., 96, (12.)

6. If a *feme sole*, just before her marriage, convey slaves to her mother, without the knowledge or consent of her intended husband, he cannot, after marriage, recover them back in right of his wife, at least in a court of law. *Johnson v. Hamblet*, 2 Car. L. R., 96, (193.)

7. A warranty of title, annexed to a slave sold to the wife before coverture, if the slave be recovered from the husband after the death of the wife, does not survive to the husband; because, though relating to property which did vest in the husband, its essential quality as a chose in action remained unaltered; and the husband could not recover upon it, except as the administrator of the wife. *Casey v. Fonville*, 2 Car. L. R., 404, (287.)

8. A slave hired out for a year is not a chose in action, and if a *feme* owner of such slave marry during the year and her husband die before the end of it, the slave will not survive to her, but will vest in his personal representative. *Whitaker v. Whitaker*, 1 Dev., 310. S. P., *Granberry v. Mhoon*, *Ibid*, 456. *Pettijohn v. Beasley*, 4 Dev., 512.

9. The husband, by his marital rights, is entitled to the personal estate of his deceased wife, whoever may administer. *Hoskins v. Miller*, 2 Dev. 360.

10. The husband acquires, by marriage, no estate in the land of his wife, of which she is not actually seized. And where the wife has a vested remainder in lands, a sale, in the lifetime of the particular tenant, of the husband's interest passes nothing to the purchaser. *Gentry v. Wagstaffe*, 3 Dev., 270.

11. *It seems* that, at law, the husband's assignment will pass every expectant chattel interest of the wife, as if it were an interest of his own, unless so limited that it cannot, by possibility, vest in possession during the coverture. But, at all events, an assignment of the husband, if not binding on the wife surviving, while the interest continues expectant, is certainly valid as a conveyance, when the interest falls into possession during the coverture. *Burnett v. Roberts*, 4 Dev., 81.

12. Slaves lent to a woman before marriage will be held by her husband as bailee, and the statute of limitations will not operate in favor of his possession, until the contract of bailment is at an end. *Logan v. Simmons*, 1 Dev. and Bat., 13.

13. A conveyance by a woman before marriage is not, at law, under any circumstances, a fraud upon the marital rights of the husband. *Ibid*.

14. The husband is not, by marriage, the purchaser of his wife's chattels. Marriage is the only *contract* between the parties; the *law* gives to the husband his wife's goods as an incident. And what the wife has disposed of before marriage is not hers, and, therefore, is not transferred to the husband. But on ante-nuptial voluntary bond, or conveyance of the wife, may, in some cases, be relieved against in equity. *Ibid.*

15. If an administrator marry the next of kin of his intestate, and has assets, and, upon the death of his wife, administers upon her estate, her distributive share becomes his property, the claim being, by mere operation of law, satisfied and extinguished; and, in such case, *it seems*, the wife's share would become the property of the husband, without an administration on her estate. *Dozier v. Sanderlin*, 1 Dev. and Bat., 246.

16. Where an intestate is indebted to the wife of his administrator, and the latter has assets, the debt is satisfied by the mere operation of law, and does not survive to the wife. Whether the debt of the intestate be due to the husband or the wife, and whether the one or the other be the representative, the doctrine of retainer applies, and the debt is extinguished. *Ibid.*

17. A husband has, *jure mariti*, such a dominion over the vested legal interest of his wife in a chattel, real or personal, of which a particular estate is outstanding, that he can sell such interest, so as to transfer it completely to the purchaser; or the law can transfer it for his debts. But the rule is different as to the assignment by the husband of his wife's equitable interest in a chattel, in which she has not the right of immediate enjoyment; for such assignment will not prejudice her right, should he die before her, and before the period allotted for such enjoyment to take effect. *Knight v. Leake*, 2 Dev. and Bat., 133.

18. A legacy given to a wife during coverture, but not paid to the husband during his lifetime, survives to her; especially where he joined her in a suit to recover it, and died before final judgment. *Revel v. Revel*, 2 Dev. and Bat., 272.

19. In lands conveyed to husband and wife, they have not a joint estate, but hold by entireties, and upon the death of either of them, the whole estate continues in the survivor, notwithstanding the act of 1784, for abolishing the right of survivorship. *Motley v. Whitmore*, 2 Dev. and Bat., 537. (See Rev. Code, ch. 43, sec. 2.)

20. A distributive share, accruing to a wife during coverture, does not vest in the husband, but will survive to the wife, unless reduced into possession by the husband. *Mardree v. Mardree*, 9 Ired 295.

21. Where the wife is the sole next of kin, and the husband the administrator, and the debts of the intestate are paid or assumed by him, and there are no reasons why he should hold any

longer as administrator, the presumption is very strong that he hold as husband, and consequently for himself. *Ibid.*

22. Where there are other next of kin besides the wife, the husband being administrator, he must, in order to entitle himself to the property in his own right, appear to be dealing with it as his own, and not as administrator. Thus, where there were other funds for the payment of debts, and the husband and the other next of kin agreed to work the slaves on the intestate's lands, and at the end of the year to divide the proceeds of the crop "according to their right as distributess," *it was held* that this was a sufficient reduction into possession by the husband, to prevent any right of survivorship in the wife. *Ibid.*

23. Property conveyed to a married woman, after a decree obtained in her favor under the act Rev. Stat., ch. 39, sec. 12, is not protected against the claims of the husband's creditors, if the husband has paid, either from his own means or the earnings of his infant children, who live with him, the whole or any considerable portion of the purchase money. *Worth v. York*, 13 Ired., 206. (See Rev. Code, ch. 39, sec. 14.)

24. Where personal property belonging to a *feme* is held adversely for more than three years against her, while she is an infant, and during her coverture, which commenced before she became of age, she, upon the death of her husband, is entitled to recover it, as her infancy and coverture prevented the statute of limitations from barring her right, and the adverse possession of the property prevented it from vesting in her husband. *Airey v. Holmes*, 5 Jones, 142.

25. If a man marry a woman, who was divorced from her first husband on account of her adultery, the marriage, during the life of the first husband, is absolutely void, and the second husband cannot acquire any interest in her property, given to her during the existence of such unlawful marriage. *Calloway v. Bryan*, 6 Jones, 569.

26. A bequest of slaves to a man and his wife "during their natural lives," and "then to the lawful heirs of the wife," gives the absolute estate to the wife by the rule in *Shelly's* case, and it immediately vests in the husband, *jure mariti*. *Hodges v. Little*, 7 Jones, 145.

27. The act of 1848, Rev. Code, ch. 56, sec. 1, does not deprive the husband of his estate by the curtesy, in the lands of his wife. *Houston v. Brown*, 7 Jones, 161.

28. Where, by a deed to a *feme covert*, an estate was conveyed to her for her own life, *it was held* that her husband had no interest in it, except the right to receive the rents and profits during the coverture. *Gray v. Mathis*, 7 Jones, 502.

See (Executors and Administrators—Of their liability to legatees and next of kin, 7.)

IV. CONVEYANCE OF REAL ESTATE TO HUSBAND AND WIFE.

1. Where a conveyance of land is made to husband and wife, they do not take interests as joint tenants or tenants in common, but they take estates in fee by entireties, and not by moieties; and the husband cannot, by his own conveyance, divest the wife's estate, but, on her surviving him, she is entitled to the whole estate. *Needham v. Branson*, 5 Ired., 426.

2. A conveyance of land, to a husband and his wife and their heirs, vests the entirety in each of them, and, upon the death of either, the survivor takes the whole in severalty. *Woodford v. Higly*, 1 Winst., 237.

See (Husband and Wife—Husband's interest in his wife's estate, &c., 19.)

V. CONVEYANCES BY HUSBAND AND WIFE.

1. It must appear that a deed from husband and wife was acknowledged by the husband, as well as the wife. *Whitehurst v. Hunter*, 2 Hay., 401, (604.)

2. The privy examination of a *feme covert*, as to the execution of a deed, cannot be proved by parol. *Harrell v. Elliott*, Tay., 139, (86.) S. C., 2 Hay., 68, (236.)

3. On a deed from husband and wife, there was a certificate endorsed, "that the wife appeared in open court and acknowledged the deed before the court, was privately examined, and said it was executed freely and without compulsion," and on the minutes of the court there was an entry that the deed "was acknowledged;" and it was registered. *Held* that it must be presumed to have been acknowledged by the husband, though not so expressly stated. *Hunter v. Bryon*, 2 Murph., 178.

4. The deed of a *feme covert*, without a private examination as directed by act of assembly, is a mere nullity and void; and, to give validity to her deed, it must *appear* that her private examination has been had pursuant to the act; if it appear by the clerk's certificate merely that "the deed was acknowledged in open court, and ordered to be registered," a private examination will not be presumed from such certificate. *Robinson v. Barfield*, 2 Murph., 390. (See Rev. Code, ch. 37, sec. 8, and following.)

5. By the act of 1715, as explained and amended by the act of 1751, a deed to convey the lands of a *feme covert* must, except in case of her inability to attend, be acknowledged by the husband and wife in open court, and proof of the execution by witness is not sufficient. Under these acts, the proper mode to bar the wife, when she is able to attend, is for the husband and wife to acknowledge the deed personally in open court, and then for one of the court to take the private examination of the wife. *Burgess v. Wilson*, 2 Dev., 306.

6. When the wife cannot attend, the deed must be first proved as to the husband, and then a commission issued to two or more commissioners to take the acknowledgment and privy examination of the wife. *Ibid.*

7. Where a justice of the court was ordered to take the private examination of the wife, before the deed was proved as to either the husband or the wife, who, upon making his report, proved the execution of the deed by the husband and wife, and also certified as to her private examination, *held* that the deed was inoperative and did not bar the heirs of the wife. *Ibid.*

8. The deed of a *feme covert* does not bind her, when her private examination was taken under a commission by one commissioner alone, and when she was neither a resident of another county, aged nor infirm. *Barfield v. Combs*, 4 Dev., 514.

9. Where it did not appear, either in the order for a commission to take the private examination of a *feme covert*, or in the commission itself, that she was an inhabitant of another county, or so aged or infirm as to be unable to travel to court, *it was held* that the deed was inoperative to convey the wife's interest in the land. *Fenner v. Jasper*, 1 Dev. and Bat., 34.

10. *It seems* that it must appear that the commission and the certificate of the commissioners were returned to the court, approved and ordered to be registered, or the deed will be invalid as to the wife's estate in the land. *Ibid.*

11. A certificate of commissioners appointed by another state to take the private examination of a *feme covert*, touching the free and voluntary execution of her deed, which states merely that she "acknowledged the same to be her act and deed in due form," is not a compliance with the act of 1810, which requires a certificate of her acknowledgment, that she executed the deed freely, and "doth voluntarily assent thereto." *Lucas v. Cobbs*, 1 Dev. and Bat., 228. (See Rev. Code, ch. 37, sec. 5.)

12. An order that the deed of a *feme covert* residing in another state, with the accompanying commission and certificates, be registered, is not conclusive that all the requirements of the statute have been complied with; and the omission of all or any of them may be shown, when the deed is offered in evidence upon any trial. *Ibid.*

13. The deed of a *feme covert* is void at common law, and can only be effectual when executed according to our acts of assembly on that subject. By these acts the deed is to be first acknowledged or proved, both as to husband and wife, and, then, if she is a resident of another county, or unable to attend from age or infirmity, a commission may be issued to take her private examination, either by a judge or the county court; and when her examination preceded the probate, the deed was held to be inoperative. *Sutton v. Sutton*, 1 Dev. and Bat., 582.

14. Either a judge out of court, or the county court in session

may, upon being satisfied of the wife's inability to attend for a privy examination, order a commission to issue for taking it. *Ibid.*

15. Where neither the certificate of the commissioners, appointed to take the private examination of a *feme covert*, upon a deed made by her and her husband, nor any record produced, show that she was *privately* examined, the deed is void as to her. *Ives v. Sawyer*, 4 Dev. and Bat., 51.

16. Where a commission issued, by order of a county court, to take the private examination of a *feme covert* as to her execution of a deed, the recital in the commission that "it has been represented to our said court that M. W. (the *feme covert*,) is *indisposed*, so that she cannot travel to our said court," &c., is as effectual as if the same recital had been made in the order of the court directing the commission to issue. And the words "indisposed, so that she cannot travel," &c., taken in reference to the subject matter, must mean "unable to travel from sickness." *Skinner v. Fletcher*, 1 Ired., 313.

17. Where the commissioners certified that they took "the private examination" of the *feme covert*, and that she acknowledged that "she executed the deed without any compulsion from her husband or any other person," this is sufficient, without saying that she was examined "privily and apart from her husband." On the subject of the examination of *femes covert*, as to the execution of deeds, the phrases "privy examination," "private examination," and "examination separate and apart from her husband," are indifferently used in our acts of assembly. *Ibid.*

18. A deed of husband and wife, dated 1st March, 1834, was offered in evidence, and to prove the due execution of the deed by the wife, a commission issued by the court to two justices to take the private examination of the wife, dated 17th February, 1834, reciting that a deed had *theretofore* been executed by the husband and wife, and authorizing the justices to take the private examination, together with the return of the justices endorsed on the deed of 1st March, 1834, was offered in evidence, *it was held* that the deed of the 1st March, 1834, was not the deed intended to be submitted to the commissioners, and that their certificate endorsed on that deed was made without authority, and was therefore void, and that, of course, the deed did not pass the title of the wife. *Rich v. Beeding*, 2 Ired., 240.

19. Where a deed from husband and wife, for the real estate of the wife, had on it only the following certificate from the clerk of the county court, as to its execution, to wit: "the private examination of H. J., wife of J. C. J., taken by C. A. H., a member of the court, which, being satisfactory, is ordered to be recorded," and signed "C. A. H., J. P.," and a proof of the execution of the deed by the subscribing witness and an order of

registration, *it was held* that the wife's interest in the land did not pass. *Jones v. Lewis*, 8 Ired., 70.

20. Where a deed was acknowledged in the county court by husband and wife, and two justices took the private examination of the wife, and reported the same to the court, and the court acted upon the report, *it was held* that the inference was irresistible, that the two justices were members of the court appointed for that purpose, though no special order of appointment appeared. *Etheridge v. Ferebee*, 9 Ired., 312.

21. It is sufficient, if the certificate of the private examination of the wife state that, upon such examination, she declared that she had voluntarily *executed* the deed, without saying that "she doth now voluntarily assent thereto." *Ibid.*

22. If, upon her privy examination, the wife state that, though she was willing to convey when she executed the deed, yet she had changed her mind and was then unwilling, her assent cannot be certified. *Ibid.*

23. It is immaterial whether the acknowledgment or the private examination be first recorded. *Ibid.*

24. Where a deed from husband and wife had on it the following entries: "State of N. C., Currituck county, Feb. Term, 1832, personally appeared, L. C., wife of J. C., and in open court acknowledged that she assigned the within deed of her own free will, without any constraint whatever. Let it be registered. (Signed) W. D. B." "This deed from J. C. and L. to S. F., was exhibited and proved in open court by J. L. S., the subscribing witness. At the same time, L. C., the *feme covert*, personally appeared in open court, and being privately examined by W. D. B., one of the court appointed for that purpose, who reported that the said L. C. acknowledged the execution of the said deed of her own accord, and without any constraint whatever, &c. On motion, ordered to be registered. (Signed) S. Hall, C. C. C." And there was also the following entry on the minute docket of the same term: "A deed from J. C. D. and wife L., to W. C. E., was proven as to J. C. and wife, by the oath of J. S., a witness thereto, and her private examination taken in open court and ordered to be registered." *It was held* that these entries did not show that the wife had been privily examined, as required by law. *Etheridge v. As'bee*, 9 Ired., 353.

25. Upon the probate of a deed for land by husband and wife, the wife residing in another state, a commission to take the private examination of the wife may issue from the court of the county where the land lies, under the act of 1751. In the Revised Statutes, by a misprint, the word "country," in the act of 1751, is changed to the word "county," but from the context, the construction of the Revised Statute must be the same as that of the act of 1751. *Pierce v. Wanett*, 10 Ired., 446. (See Rev.

Code, ch. 37, sec. 9, where the words "country or county" are inserted.)

26. In order to be allowed to introduce in evidence the deed of a married woman, the following facts were proved: "That upon the record of N. H. county court, at August term, 1818, there was an entry in these words: Ordered that J. M. C. and D. J. be appointed to take the private examination of S. P., wife of P. P., touching her free execution of a deed executed by them to Samuel Potter, dated July 21st, 1818. On the 10th of August the clerk issued a commission to the said J. M. C. and D. J., as residents of N. H., to take privy examination of the *feme*, reciting that the deed had been proved in the county court, and that it had been represented to the court, that the said S. P. could not travel, &c., and upon it the commissioners on the same day returned the private examination," and then follows an entry on the commission, that the execution of the deed was proved by J. M. C., who, and D. J., are the subscribing witnesses; upon which it was registered. *It was held* that this was not sufficient proof of the execution of the deed by the wife. *Ibid.*

27. A certificate of probate on the deed of a *feme covert* set forth, that the deed "was exhibited in open court and the execution thereof by (the husband) was proved by T. S., (a subscribing witness,) and acknowledged by (the *feme covert*) when on motion in open court (L. S., Esq.,) one of the presiding justices was appointed to take the private examination of (the said *feme covert*) as to her consent in signing the said deed, who reported she acknowledged to have signed it of her own free will and accord, without any compulsion from her said husband. Ordered to be recorded;" and *it was held* that the probate was sufficient to make the deed valid against the wife. *Beckwith v. Lamb*, 13 Fred., 400.

28. A copy of the probate of a deed, by the subscribing witness, also of the order made by the county court to appoint commissioners to take the private examination of a *feme covert*, was inserted on the deed itself, as also was the report of the commissioners, which were duly registered, though no other commission issued to them and no other report was made to the court; and *it was held* that this was a substantial compliance with the act of assembly, and that the deed was duly authenticated. *Hathaway v. Davenport*, 2 Jones, 152.

29. A deed made by a husband and wife for the wife's land, to one who died previously to the probate and privy examination of the wife, is good, and relates back to the time of its execution, provided that, after the bargainee's death, it was duly acknowledged, the privy examination of the wife taken, and the deed registered. *Hall v. Bunker*, 2 Jones, 440.

30. Where a husband professed to convey, in fee simple, land which belonged to his wife, by a deed in which he only was

mentioned as the grantor, and after the delivery of the deed his wife signed and sealed it, *it was held* that she was not thereby made a party to the deed, and, consequently, that her interest in the land was not thereby conveyed. *Kerns v. Peeler*, 4 Jones, 226.

31. Where a certificate, on the back of a deed by a husband and wife for the wife's land, purported to be an acknowledgment in the county court, and an examination of the wife before some member of that court, but was subscribed by the name of a judge of the superior court, *it was held* that the certificate was ineffective. *Barbee v Taylor*, 6 Jones, 40.

32. Where there was an order to take the private examination of a feme covert, and there was also a probate of the deed as to the husband by a subscribing witness, and a commission, and its return, certifying that the commissioners had taken the privy examination, and that the wife had declared that she executed the deed freely and voluntarily, and an order of registration, all appearing to have been done on the first day of the court, *it was held* that it must be taken that the proof of the deed, as to the husband, occurred before the order and commission for examining the wife—especially as the commission recited that the deed had been proved, and that, consequently, the probate and privy examination were sufficient. *Pierce v. Wanett*, 6 Jones, 162.

33. Where a feme covert, having a life estate only in land, made a deed purporting to convey it in her own name, her husband not being named as a party to the deed, though he affixed his signature to it along with his wife, *it was held* that it was void as to her, on account of the coverture, and as to him, because he was not a party to it; and that no privy examination could give validity to such an instrument. *Gray v. Mathis*, 7 Jones, 502.

34. Where the intention of the parties to a deed is manifest on its face, the court, in giving a construction to doubtful provisions, will, if possible, effectuate such intention. Hence, where a wife, after marriage, supposing the whole interest in her land was in her, made a conveyance to a trustee for her sole and separate use, in which the husband was mentioned as a party, and executed it as a party, and he also, by various clauses, manifested a concurrence in her act, but did not profess to convey any estate, *it was held* that the sum of ten dollars, recited in the deed as having been paid to the wife, was, in legal effect, paid to him also, and that this sum raised a use from the husband to the trustee, which was executed by the statute of uses, and thus his interest in the land, as well as that of the wife, was transferred to the trustee. *Barnes v. Haybarger*, 8 Jones, 76.

See (Estoppel—By Deed, 32–36–37.) (Limitations—As to real estate, 19.)

VI. OF MARRIAGE SETTLEMENTS AND AGREEMENTS.

1. The act of 1785, which requires the registration of marriage contracts, makes them void against creditors only, if it be omitted. *Richardson v. Fleming*, 2 Car. L. R., 455, (341.) (See Rev. Code, ch. 37, sec. 24.)

2. Articles made in contemplation of marriage, whereby the intended husband "sells and assigns" to a trustee all the right in slaves belonging to the intended wife, "which he by operation of law may thereafter have," do not pass a title in the slaves to the trustee, but are merely executory, and bind the husband, after marriage, to make the necessary assurances to carry them into effect. *Cox v. Murphy*, 2 Dev. and Bat., 257.

3. The act of 1829, which enacts that no deed of trust or mortgage shall be valid to pass property, as against creditors, but from the registration thereof, embraces only those deeds in trust which are intended as securities for debts, and does not include deeds of settlement between husband and wife, in which the property is conveyed to a trustee in trust for the wife; the deeds of the latter class being provided for, as to their registration, in the 29th section of the Revised Statutes. *Saunders v. Ferrill*, 1 Ired., 97. (See Rev. Code, ch. 37, sec. 22 and 24.)

4. A post-nuptial settlement, made between husband and wife, in which a greater interest in the property is secured to the wife than was provided for in the marriage articles, is void as against creditors, under the acts of 13 Eliz. and 1715. *Ibid.* (See Rev. Code, ch. 50, sec. 1.)

5. No ante-nuptial agreement or transaction between husband and wife can be proved by parol, to support a settlement made after marriage, to the obstruction of the husband's creditors; for the act of 1785, which requires "all marriage settlements and other marriage contracts" to be registered within a particular time, to make them valid against creditors, must necessarily exclude all such contracts as in their nature do not admit of registration. *Ibid.* (See Rev. Code, ch. 37, sec. 24 and 25.)

6. Marriage settlements must be proved within six months after their execution, before a judge either of the superior or supreme court, or before a court of record; otherwise they will be void as to creditors. Probate before the clerk of the county court, as in the case of deeds in trust, will not be sufficient; and an unauthorized registration is not even notice. *Smith v. Castrix*, 5 Ired., 518. (It seems they may now be proved before the clerk of the county court, or his deputy. See Rev. Code, ch. 37, sec. 2 and 24.)

7. A married woman cannot make a contract with her husband, except through the intervention of a third person, to whom the duty of enforcing it, in her behalf, belongs; and it must be

by a deed to which she is a party. *Barbee v. Armstead*, 10 Ired., 530.

See (Registration, 35-36-37.)

VII. OF ACTIONS BY AND AGAINST HUSBAND AND WIFE.

1. If a *feme covert* sue in her own name, for money earned by her during coverture, she shall recover, if her marriage be not pleaded in abatement, as advantage cannot be taken of it on a motion for a nonsuit. *Quere* by Haywood. *Newton v. Robinson*, 2 Hay., 121, (285.) S. C. Tay., 72, (50.)

2. Husband and wife must join in detinue for her slave, detained before, and at the time of the marriage. *Johnston v. Pasteur*, Conf. Rep., 464, (520.) S. C., 2 Hay., 406, (495.) S. P., *Norfleet v. Harris*, Conf. Rep. 517, (564.)

3. Where the wife was an infant, when the act of 1806, relative to parol gifts of slaves was passed, and became *covert* during her infancy, the act cannot be set up against a suit brought by her husband and herself; and in such action they may, and ought to join. *Allen v. Gentry*, 2 Car. L. R. 609, (411.)

4. Where a defendant in detinue holds adversely a chattel, claimed under a *feme* before marriage, the husband and wife must join; but where the defendant is a bailee, the right of the husband accrues, and is complete, upon the marriage, and the possession of the bailee is his possession, and consequently he must sue alone. *Armstrong v. Simonton*, 2 Murph., 351, S. C. N. C. Term R., 266, (690.)

5. Husband and wife cannot join in detinue for a chattel, if the husband had actual or constructive possession after marriage, for, by the marriage and such possession, the whole vests exclusively in the husband. *Spiers v. Alexander*, 1 Hawks, 67.

6. The husband of a *feme cestui que trust* cannot recover her interest in slaves, held by a trustee under a deed in trust, to be divided between her and others, without joining his wife. *Gillis v. McKay*, 4 Dev., 172.

7. Where a person has been admitted, on motion, under the act of 1798, a party to a suit as the husband of a *feme sole*, by whom the suit had been instituted, it is too late afterwards for the defendant to object to the validity of the marriage, except on an application for rescinding the order of admission as improvidently made. While such order remains in force, no evidence can be received, on the trial of the cause upon the issues, for the purpose of impeaching the validity of the marriage. The objection should have been made, when the motion for admission was submitted to the court, and the question then tried. *Hobbs v. Bush*, 2 Dev. and Bat., 508.

8. If a woman sue, and afterwards marry, and the marriage is not pleaded in abatement *puin darrein continuance*, she may have

judgment, and it cannot be reversed for error. *Johnson v. England*, 4 Dev. and Bat., 70.

9. The husband has entire control over a judgment confessed to, or obtained by, his wife during coverture, and the proper way for him to proceed to enforce it is by making himself a party by *sci. fa.*, as in case of a judgment obtained by a *feme covert dum sola*, who had married before execution. *Ibid.*

10. Whenever a suit will survive to a wife, she may be joined with her husband in the action. *West v. Tilghman*, 9 Ired., 163.

11. An action upon the administration bond of an administrator, for a distributive share belonging to a married woman, must be brought on the relation of husband and wife, though the husband may have assigned his wife's share to a third person. *State v. Clark*, 10 Ired., 172.

12. Where the husband has possession of the wife's land, after issue born, *case*, in the nature of waste, is the proper remedy for an injury to the inheritance by cutting timber trees, and should be in the name of the husband and wife jointly. But, for an injury to the crop, he must sue alone, and the statute of limitations bars the action after three years. The rule is, where the husband may sue alone, or *may* join his wife, the statute of limitations bars; but when he *must* join his wife, the statute does not bar, for it is her action. *Williams v. Lanier*, Busb. 30.

13. For a trespass to the land of the wife, before marriage, the wife is a proper party with the husband, in a suit for the same. *Hair v. Melvin*, 2 Jones, 59.

14. A husband can maintain an action of ejectment on a separate demise by himself, though he claims under a deed made to himself and his wife. *Topping v. Sadler*, 5 Jones, 357.

15. Where a husband and wife joined in a demise in an action of ejectment, dated before they were married, *it was held* that the action could not be sustained. *Elliott v. Newbold*, 6 Jones, 9.

16. For an injury to the wife's land after coverture, she may join with her husband in an action of trespass, and both husband and wife may join with other tenants in common, for an injury to their common property. *Deans v. Jones*, 6 Jones, 230.

17. In an action against a ferryman for negligence in carrying the plaintiff's wife across his ferry, whereby she was injured, it is not necessary that she should be joined as a party plaintiff. *Crump v. McKay*, 8 Jones, 32.

VIII. HOW FAR THE HUSBAND IS BOUND BY THE ACTS AND ADMISSIONS OF HIS WIFE, BEFORE AND AFTER MARRIAGE.

1. Where the wife is the agent or servant of her husband, her acts and admissions against his interest are admissible in evidence. *Hughes v. Stokes*, 1 Hay., 372, (427.)

2. Husband suing, as administrator of another person, for

slaves, is not estopped by the deed of his wife, made while sole, conveying the slaves to the defendant. *Millison v. Nicholson*, Conf. Rep., 499, (549.) S. C., 2 Hay., 306, (494.)

3. A husband may show the idiocy of his wife before coverture, to avoid a deed made by her while she was in that condition. *Ibid.*

4. The husband is bound by the acts or declarations of his wife, done or made while she is acting as his agent. *Torrence v. Graham*, 1 Dev. and Bat., 284.

5. A *feme covert* may become an agent for her husband, and such an appointment as agent may be inferred from his acts and conduct respecting her. When the agency is to be inferred from his conduct, that conduct furnishes the only evidence of its extent as well as of its existence, and in solving all questions on this subject between the principal and third persons, the general rule is that the extent of the agent's authority is to be measured by the extent of his usual employment. *Cox v. Hoffman*, 4 Dev. and Bat., 180.

6. The husband is responsible for any injury done to the property of another person, by the negligence, carelessness or unskillfulness of his wife in her performance of his business, the wife, in this respect, being considered as his servant. *Ibid.*

7. If a husband and wife live separate, and a person, having notice that the husband does not hold himself liable for any debts she may contract, trusts her even for necessities, he cannot recover for them against the husband, unless he can show that the wife had a good cause for the separation. *Pool v. Everton*, 5 Jones, 241.

IX. OF THE LIABILITY OF A WIFE FOR HIS ACTS DURING COVERTURE.

1. A plaintiff cannot convert an action founded on contract into one for a tort, so as to charge a *feme covert* defendant. To do so, the tort complained of must be an actual trespass. Therefore, where the plaintiff hired to the wife of A a horse, she acting as the agent of her husband, and the horse was injured by immoderate driving, and the action was brought against the husband and wife jointly, but abated as to the former by his death, *it was held* that the action did not survive against the wife. *Barnes v. Harris*, Busb., 15.

2. Where a *feme covert*, having a separate estate, but living with her husband, contracted debts without the concurrence of her trustee, and without charging them specifically on her separate estate, *it was held* that she was not liable to pay them, and that her promise to do so, after the death of her husband, was without consideration and void. *Felton v. Reid*, 7 Jones, 269.

IDIOTS AND LUNATICS.

1. The proper finding in an inquisition of lunacy is that the party is an idiot or lunatic, though it may answer to find that he is of "insane mind," but not that he is "incapable of managing his affairs," which is void. *Armstrong v. Short*, 1 Hawks, 11.

2. No person is entitled to a traverse to an inquest of office in its proper and technical sense, under the Stat. 2 Ed. 6, so as to vacate the office, unless he be interested at the time of filing it. But such an inquest, when offered in evidence, is only presumptive proof against all persons not parties or privies; *held*, therefore, that in debt on a bond given after an office was found, where an inquisition was pleaded for the defendant, the plaintiff might, in his replication, traverse the truth of it, and upon the trial give evidence in support of his traverse. *Ibid*.

3. An inquisition of lunacy, which appeared to have been taken by the coroner and twelve freeholders, and returned to the court, and by it confirmed, and from which it did not appear that the lunatic was present, was offered in evidence to support the plea of *non compos mentis*, and it was *held*, that having been receive by the county court as an inquest, and a guardian having been appointed under it, it was admissible as the record of an inquest. *Arrington v. Short*, 3 Hawks, 71.

4. The proceedings on an inquisition of lunacy are not void, because no affidavit accompanied the petition to the court, nor because the alleged lunatic was not present at the time of taking the inquest, nor because the jury, in their inquisition returned to the court, found that "he is lunatic and idiotic," they having also found that "he is of nonsane memory." The former word should be rejected as surplusage. *Bethea v. McLennon*, 1 Ired., 523.

5. It is generally proper that an affidavit should accompany the petition, but this is a matter for the discretion of the court to which the petition is addressed. *Ibid*.

6. The alleged lunatic has a right to be present at the inquest, and if this right be denied him, it is good cause for setting aside the inquisition. But where an inquisition, taken by order of a court of competent jurisdiction, is returned to and confirmed by the court, it is to be respected like other judgments of a court, until it be reversed or superseded. *Ibid*.

7. The guardian of a lunatic cannot bring an action of ejectment, nor any other action at law, in his own name, though the guardian of an infant may bring ejectment in his own name. *Brooks v. Brooks*, 3 Ired., 389.

8. A guardian of a lunatic may, by order of the county court, rightfully sell the personal property of the lunatic for the payment of his debts, provided there be no fraud in the proceeding. *Howard v. Thompson*, 8 Ired., 367.

9. Contracts with lunatics are not all absolutely void; but such as are fairly made with them for necessities, or things suitable to their condition and habits of life, will be sustained. And when a person is so insane as to attempt to injure himself, and to destroy his property, the services of a nurse and guard fall within the class of necessities, as defined by law. *Richardson v. Strong*, 13 Ired., 106.

10. An action accruing to a lunatic must be brought in his name, and not in that of his guardian. *Green v. Kornegay*, 4 Jones, 66.

11. An inquisition of lunacy is not conclusive against a person dealing with a supposed lunatic; but he may show that, at the time of the contract, such supposed lunatic had sufficient capacity to make it. *Parker v. Davis*, 8 Jones, 460.

INCENDIARY PUBLICATIONS.

1. The delivery of a copy of an incendiary publication to one individual, with an unlawful intent, is a circulation, within the prohibition of the act, Rev. Code, ch. 34, sec. 16. *State v. Worth*, 7 Jones, 488.

2. In a prosecution under the act, it is not necessary to aver or prove that the forbidden publication was delivered to a slave or free negro, or was read in his presence. *Ibid.*

3. A bound volume, having the tendency described in the act, is within the meaning of it. *Ibid.*

4. A book, which denounces slavery as worse than theft, and as leading to murder, and proclaims that it must be put an end to, even at the cost of blood, is within the meaning of the act, as tending to excite slaves to insurrection. *Ibid.*

See (Evidence—In criminal proceedings and indictments, 118.)

INDECENCY.

See (Indictment.—Form and matters relating thereto, 82.)

INDIAN LANDS.

1. The act of 1783 forbade entries or surveys to be made of certain lands, set apart for the Cherokee tribe of Indians. In 1791, this tribe, in a treaty with the general government, "relinquish, release and cede these lands." The right of the Indian tribes to lands is regarded, by the European and American governments, as a mere possessory right, and the cession of this right by the Cherokee tribe vested the right in North-Carolina, and the United States were the agents for North-Carolina for that purpose. *Strother v. Cathey*, 1 Murph., 162.

2. The grant made by the Governor in 1717, to the Tuscarora tribe of Indians, was absolute and unconditional, and did not require the residence of the Indians upon the land. *Sacarusa v. King*, 2 Car. L. R., 451, (336.)

3. The proviso in the act of 1748, being in derogation of the rights actually vested in the plaintiffs (Indians,) cannot be regarded. But if the legislature of 1748 could rightfully superadd the condition contained in the proviso, subsequent legislatures had an equal right to modify or abrogate it. And the acts of 1778 and 1802 make a different appropriation of the land, on the happening of either of the events mentioned in the act of 1778, from that made by the act of 1748. *Ibid.*

4. Cherokee Indians, in possession of land within the limits of North-Carolina, reserved under the treaties of 1817 and 1819, made between the United States and the Cherokee nation, are to be considered as purchasers of the lands; the exercise of power by the commissioners of the United States being legitimate, and the treaties having been recognized by several acts of our legislature. The Indians need not claim under a grant issued in the usual manner, but may derive title by a special grant, such as that under which the university claims escheated lands, by virtue of an act of assembly. *Euchelah v. Welch*, 3 Hawks, 155.

5. Under the 3d article of the treaty of 1819, between the United States and the Cherokee Indians, the particular Indians, residing within the limits of North-Carolina, to whom reservations in fee simple were made, had a right to alienate the tracts reserved as they thought proper, prior to, and independent of, any act of the State legislature. *Belk v. Love*, 1 Dev. and Bat. 65.

6. The condition, annexed to the reservations under this article, does not require a perpetual residence on the tracts reserved, but only a notification of an *intent* to reside, which is a condition precedent, and, when complied with, the estate becomes absolute. But if this were otherwise, an individual could not treat the estate as at an end, before the State enforced a forfeiture for a breach of the condition. *Ibid.*

7. The right to a reservation of land, granted by the treaty

with the Cherokees in 1837, to each head of an Indian family, choosing to remain in this state, does not attach to the land ceded by the treaty of 1835. *Sutton v. Moore*, 3 Ired., 66.

8. Under the acts for the sale of the Cherokee lands, the purchaser has a right, upon the certificate of his purchase from the commissioners, to institute an action of ejectment in the name of the State, against any person in possession. And the person so in possession cannot set up as a defence to this action, that he had received a deed from the purchaser, which had never been registered, but which was alleged to be lost or destroyed, by an agent of the purchaser. *State v. England*, 7 Ired., 153.

9. Under the act of 1852, ch. 169, entitled "An act to bring into market the lands pledged for the completion of the Western Turnpike Road," it is the duty of the entry taker to demand and receive bonds, for the purchase money of the land, before he takes the entry. *Jarrett v. Kingsey*, 3 Jones, 488.

10. The acts of assembly relating to the sales, &c., of the Cherokee lands, prior to the act of 1852, confer *special* authority and jurisdiction on the commissioners; and to give effect to a grant issued by virtue of these acts, the cases to which they are restricted must be shown. *Harshaw v. Taylor*, 3 Jones, 513.

11. Where a *general* authority and jurisdiction is conferred on a tribunal, the action of such tribunal is presumed to be right until the contrary is shown; but where such authority is *special*, it must be shown by the party asserting the validity of its action, that the prescribed state of facts existed, which called for such action. *Ibid.*

12. The title to the unsold Cherokee lands in the county of Haywood was, by the act of 1805, vested in the justices of that county, and where their commissioner, whose powers and duties were limited, by the order of the court appointing him, to *three months*, executed a deed for a portion of said lands at the end of *three years*, it was held to be inoperative and void. *Cooper v. Gibson*, 6 Jones, 512.

13. Where a Cherokee Indian took a reservation of a certain tract of land for himself for life, with a remainder in fee to his children, which he was authorized to do under the treaties of 1817 and 1819, but which he was to forfeit should he voluntarily abandon it, it was held that his selling the land to a white man, and leaving it, was a voluntary removal therefrom, and was a forfeiture of the whole estate, so that his children lost all right to it after his death. *Welch v. Trotter*, 8 Jones, 197.

See (Landlord and Tenant, 32.)

INDICTMENT.

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| I. In what cases an indictment will lie. | VI. Plea of former acquittal or conviction. |
| II. Form and matters relating thereto. | VII. Of quashing indictments. |
| III. Of the trial, verdict and judgment. | VIII. Variance between the allegations and proofs. |
| IV. How a presentment is to be made, or a bill found. | IX. Limitation of time within which an indictment will lie. |
| V. Effect of a <i>nolle prosequi</i> . | |

I. IN WHAT CASES AN INDICTMENT WILL LIE.

1. Where a merchant's clerk had sent goods from the store to a person at a distance, with directions to sell them, and he had not communicated this transaction to his principal, or any of his other clerks, nor made any entry of it in the books, on an indictment under the stat. 21 Hen. 8, ch. 7, (Rev. Code, ch. 34, sec. 18,) the judges differed on the question whether he could be convicted under the statute, but agreed that he might be convicted of larceny at the common law. *State v. Higgins*, Mar., 62, (59.)

2. A person may be indicted for perjury on an affidavit not signed by him. *State v. Ransome*, 1 Hay., 1.

3. An indictment for a forcible trespass will lie against persons for taking and carrying away slaves, from the possession of him who has it, though done by the command of the real owner. *State v. White*, 1 Hay., 13, (18.)

4. If a horse be stolen in one state or territory and be carried into another, an indictment for larceny in the latter cannot be supported; and upon a special verdict stating these facts, judgment must be rendered for the defendant. *State v. Brown*, 1 Hay., 100, (116.)

5. If an outhouse be so near a dwelling house, that it is used therewith as appurtenant to it; as if it be within seventeen and a half feet of it, burglary may be committed in it. *State v. Twitty*, 1 Hay., 102, (118.)

6. The State cannot divide an offence, consisting of several trespasses, into as many indictments as there are acts of trespass, that would separately support an indictment, and afterwards indict for an offence compounded of them all. *State v. Ingles*, 2 Hay., 4, (148.)

7. If a public officer, entrusted with definite powers to be exercised for the benefit of the community, wickedly abuse, or fraudulently exceed them, he is punishable by indictment, though no injurious effects result to any individual from his misconduct. *State v. Glasgow*, Conf. Rep., 38, (176.)

8. The secretary of state, whose duty it was, under an act of

the legislature, to issue land warrants under certain circumstances, was held liable to be indicted in this state for fraudulently issuing such warrants, though the title to the land, for which the warrants were issued, was in the United States, and not in this state. *Ibid.*

9. An indictment will not lie for a mere intention to pass counterfeit bank notes, knowing them to be counterfeit, if no culpable act be charged. *State v. Penny*, 1 Car. L. R., 517, (130.)

10. Profane swearing, independent of the disturbance and injury it may produce to those who hear it, is not indictable; but when the facts will support a charge of it as a nuisance, it is indictable. *State v. Kirby*, 1 Murph., 254. S. P., *State v. Ellar*, 1 Dev., 267.

11. An indictment for trespass in taking personal property can only be supported when the taking is by force, or *manu forti*. *State v. Flowers*, 2 Murph., 225, S. C. 1 Car. L. R. 97, (13.)

12. If one gain possession of a slave who has come upon his land, he may protect himself and the slave from an attempt to retake the latter, made by one claiming property; and may use the necessary force to retain possession of him. *Ibid.*

13. Where there is one continuing transaction, though there may be several distinct asportations in law, yet the party may be indicted for the final carrying away, and all who concur are guilty, though they were not privy to the first or the intermediate acts. *State v. Trexler*, 2 Car. L. R. 90, (188.)

14. An indictment will lie against the commissioners of a town for culpable omission and negligence in keeping the streets in repair; because they are invested with power to levy taxes, one object of which is to keep the streets in good order. *State v. Commissioners of Fayetteville*, 2 Car. L. R. 617, (419.)

15. A person, who contracts with the county to keep a bridge in repair, may be indicted for a neglect to do so. *State v. Crowell*, N. C. Term R, 254, (683.)

16. Where defendants are bound to keep the streets of an incorporated town in order, and three or four streets are presented on the same day, the defendants should be indicted but once for all; and if separate bills be found, a conviction of one may be pleaded in bar of the others. *State v. Commissioners of Fayetteville*, 2 Murph., 371.

17. A paper writing in these words: "Received of J. D. his book account in full. J. L." is a receipt for money within the act of 1801, concerning forgery; it being proved that at the day it bears date J. D. was indebted to J. L. in a sum of money, upon an open account—so would be the words: "Received the above in full" at the foot of an account; and all debts are understood to be received, or paid in money, unless explained by some other circumstance. *State v. Dalton*, 1 Hawks, 3.

18. To support an indictment for taking away property, it must

be a violent taking from the actual possession of the owner at the time. *State v. McDowell*, 1 Hawks, 449.

19. A challenge to fight a duel, *out* of the State, is indictable, for its tendency is to arouse the passions and produce an immediate breach of the peace. *State v. Farrier*, 1 Hawks, 487.

20. The selling of unwholesome provisions, not fit to be eaten by man, is an offence in any person, indictable at common law. *State v. Smith*, 3 Hawks, 378.

21. An indictment will lie against a person who was present, aiding and abetting in the commencement of an assault with intent to rescue a prisoner, although his fears prevented his going all lengths with his party. *State v. Morris*, 3 Hawks, 388.

22. Upon the construction of the act against a mother for concealing the birth of her bastard child, *it was held* that the *corpus delicti* was the concealing the death of a being, upon whom the crime of murder could have been committed, and that, therefore, if the child were born dead, and so shown to be by the mother, upon whom the burthen of that proof lay, the concealment was not an offence within the statute. *State v. Joiner*, 4 Hawks, 350. (See Rev. Code, ch. 34, sec. 28.)

23. A combination by two or more to do any unlawful act, or one prejudicial to another, or to the community, is indictable at common law, as conspiracy; hence, a combination by two to cheat a third person, by making him drunk and playing falsely at cards with him, is indictable at common law. *State v. Younger*, 1 Dev., 357.

24. If three persons commit a trespass upon property in the presence of the person in possession, their numbers make it indictable, though no actual force be used. *State v. Fisher*, 1 Dev., 504.

25. A fraud perpetrated upon an individual, without the use of false tokens, or any deceitful practice affecting the community at large, and without the aid of a conspiracy, but by a false assertion only, is not indictable. *State v. Justice*, 2 Dev., 199.

26. It is not an offence, either by common law or by statute, for a white man to gamble with a slave. *State v. Pemberton*, 2 Dev., 281. (It is now indictable, see Rev. Code, ch. 34, sec. 116.)

27. In an indictment for a forcible trespass upon personal property, there must be greater force than is expressed by the words *vi et armis*. The trespass must involve a breach of the peace, or directly tend to it, as being done in the presence of the prosecutor, to his terror or against his will. *State v. Mills*, 2 Dev., 420.

28. In an indictment under the act of 1791, to prevent maiming, the intent to disfigure is presumed from the act of maiming, unless the contrary appear. And under the act, the offence is complete, if the maim be committed *on purpose*, and *with intent*

to *disfigure*, though without *malice prepense*. *State v. Crawford*, 2 Dev., 425.

29. A conspiracy to murder, unaccompanied by an intent to rebel or make insurrection, is within the meaning, as well as within the words, of the act of 1802, passed to prevent conspiracies and insurrections among slaves. *State v. Tom*, 2 Dev., 569. (See Rev. Code, ch. 107, sec. 35.)

30. In an indictment for a conspiracy against two, under the act, the acquittal of one is the acquittal of the other. *Ibid*.

31. A retailer of spirituous liquors is not an ordinary keeper within the act of 1801, to prevent excessive gaming, and is not indictable under that act for permitting unlawful games to be played in his house. *State v. Hix*, 3 Dev. 116. (He is now indictable, see Rev. Code, ch. 34, sec. 76.)

32. In the act of 1801, to prescribe the punishment of forgery, the words "shall show forth, in evidence, any forged deed," &c., are confined to the exhibition of it as evidence upon a judicial proceeding; and are not equivalent to the words "utter and publish" in the statutes against counterfeiting. *State v. Briti*, 3 Dev., 122. (See Rev. Code, ch. 34, secs. 59, 60 and 61.)

33. The forging an order for the delivery of goods is within the act; and one found in the possession of a forged order is presumed either to have forged it or procured it to be forged, until the contrary appears. *Ibid*.

34. The act of 1794, to prevent owners of slaves from hiring to them their own time, does not subject the master to an indictment; the remedy being against the slave alone. *State v. Clermons*, 3 Dev. 472. (See Rev. Code, ch. 107, sec. 28 and 29.)

35. The disturbing of a congregation assembled for religious worship, by laughing and talking, and indecent actions and grimaces, during the performance of divine worship, is a misdemeanor, and *per se* indictable. *State v. Jasper*, 4 Dev., 323.

36. An indictment, which states no unlawful purpose, and sets forth no act which the defendants assembled to commit, cannot be one for an unlawful assembly. Nor is one, which charges no act of violence, nor an act calculated to inspire terror, nor any attempt to commit an act of violence, which, if committed, would make the defendants rioters, an indictment for a riot or a rout. *State v. Baldwin*, Dev. and Bat. 195.

37. Where a statute creates an offence, and not only declares the specific penalty, but also the mode in which it shall be recovered, that particular method, and no other, must be pursued. Hence it is not an indictable offence for a justice of the peace to celebrate the rights of matrimony, without a license from the clerk of the county court, under the act of 1778, as that act not only makes that an offence, which was not so at common law, but also annexes the penalty and the mode of

recovery. *State v. Loftin*, 2 Dev. and Bat. 31. (See Rev. Code, ch. 68, sec. 6.)

38. A trespass to be indictable must involve a breach of the peace, or manifestly tend to it, and must therefore be in the presence of the owner, to his terror, or against his will. *State v. Love*, 2 Dev. and Bat. 267.

39. The law confides to schoolmasters and teachers a discretionary power in the infliction of punishment on their pupils, and will not hold them responsible criminally, unless the punishment be such as to cause permanent injury to the child, or be inflicted merely to gratify their own evil passions. *State v. Pendergrass*, 2 Dev. and Bat. 365.

40. In an indictment under the act of 1779 for seducing and conveying away a slave, *it was held* that the seduction and conveying away must concur to constitute the offence; and that one who did not himself seduce, or aid in seducing the slave, but only assisted in the conveying away, could not be convicted as a principal felon. *State v. Hardin*, 2 Dev. and Bat., 407. (One who aids in carrying away a stolen slave, knowing him to be such, afterwards liable to be convicted as a principal. See Rev. Code, ch. 34, sec. 10.)

41. The act of 1816 relates to the former one of 1809, and the scope of both acts, or of the act of 1816 construed in reference to that of 1809, is to make it an indictable offence to issue, pass or receive small notes, checks or due bills, as a substitute for money. Hence the intent that a note issued should pass current as a substitute for money, or that in fact it was so issued and passed, is an essential ingredient of the offence, and must be averred in the indictment and proved on the trial. *State v. Hump reys*, 2 Dev. and Bat., 555. (See Rev. Code, ch. 36, sec. 5 and 6.)

42. A master is not at liberty to contrive the escape of his slave, who has committed a felony; but, if he be a magistrate, he should not act officially against him, and is, therefore, not indictable for declining to do so. *State v. Leigh*, 3 Dev. and Bat., 127.

43. An indictment will lie for disturbing a congregation of people assembled for the purpose of divine service, and engaged in the worship of God, although it be not in a church, chapel or meeting house, permanently set apart by a religious society for divine worship. *State v. Swink*, 4 Dev. and Bat., 358.

44. An indictment will lie for selling unwholesome provisions, but they must be in such state as that, if eaten, they would by their noxious, unwholesome and deleterious qualities have affected the health of those who were to consume them. *State v. Norton*, 2 Ired., 40.

45. On an indictment under the act in relation to the altering or defacing the marks on cattle, &c., if the act of altering or

defacing, &c., be proved to have been wilfully done, it necessarily follows that the intent was to defraud or injure the owner, unless there be proof to the contrary. *State v. Davis*, 2 Ired., 153.

46. It is no objection to a conviction on an indictment for this offence, that the cattle, beast, &c., had, at the time the act was done, strayed from its owner. *Ibid.*

47. An indictment for a conspiracy, charging the object of the conspiracy to be to cheat and defraud the citizens at large, or particular individuals, out of their land entries, is not supported by evidence that the defendants conspired "to make entries in the land office before it was opened, or before it was declared to be opened, or after it was opened, for the purpose of appropriating the lands to their own use and excluding others. *State v. Trammell*, 2 Ired., 379.

48. An indictment, charging a person with disturbing "a religious assembly, commonly called a quarterly meeting conference," cannot be supported. A meeting, the disturbance of which is an indictable offence, must be "for divine worship," "divine service," "religious worship or service," or something of the same import. *State v. Fisher*, 3 Ired., 111.

49. The offence of riding or going armed with unusual and dangerous weapons, to the terror of the people, is an offence at common law, and is indictable in this state. *State v. Huntly*, 3 Ired., 418.

50. A man may carry a gun for any lawful purpose of business or amusement; but he cannot go about with that or any other dangerous weapon, to terrify and alarm, and in such a manner as naturally will terrify and alarm, a peaceable people. *Ibid.*

51. All persons, and not planters only, are subject to indictment for not keeping up good fences, as required by the 34th and 48th chapters of the Revised Statutes. *State v. Bell*, 3 Ired., 506. (See Rev. Code, ch. 34, sec. 41, and ch. 48, sec. 1.)

52. In an indictment for arson, a building, in which goods are kept for sale by a retail merchant, is a store house within the meaning of the act, Rev. Stat., ch. 34, sec. 1. *State v. Sandy*, 3 Ired., 570. (See Rev. Code, ch. 34, sec. 2.)

53. To constitute arson, the least burning of the house is sufficient; and the charring of the floor to the depth of half an inch is certainly sufficient. *Ibid.*

54. The Buncombe Turnpike Company are bound by their charter to keep the road in good repair, and are indictable if they suffer it to become ruinous. The president and directors of the company are bound to exert all their powers, and apply all their official means, to the keeping of the road in good order; and for a default in the performance of this public duty, they are indictable. *State v. Patton*, 4 Ired., 16.

55. A person is indictable for buying from, or selling to a

slave, on his own account, even if the owner of the slave have given his permission for that purpose, unless that permission be in writing. *State v. Hart*, 4 Ired 256.

56. An authority cannot be given by any person to the slave of another, to sell an article, though that article be the property of the person giving the permission. *Ibid.*

57. Where a gate has been unlawfully erected across a public road, and the proprietor of the land, through which the road passes, and on which the gate has been placed, afterwards sells the land to A, who never actually entered into the land but leased it to others, who kept up the gate, A is not indictable for the continuance of the nuisance. *State v. Pollok*, 4 Ired., 303.

58. The profanation of Sunday, by performing labor on that day, is not an indictable offence in this state. *State v. Williams*, 4 Ired., 400.

59. A marriage between a white and colored person, contracted in 1842, was void under the act of 1830, and although this act was repealed in the Revised Statutes of 1836, yet it was therein expressly provided that the repeal should not affect right or actions, crimes or prosecutions, arising before the repeal. *State v. Hooper*, 5 Ired., 201. (Such marriages are again prohibited and declared void, see Rev. Code, ch. 68, sec. 7.)

60. Under the first clause of the 31st section of the 111th chapter of the Revised Statutes, prohibiting masters from hiring to slaves their own time, the master is not indictable, being only subject to a penalty of forty dollars; nor is he indictable under the second clause of that section, the process being against the slave and not against the master. *State v. Clarissa*, 5 Ired., 221. (See Rev. Code, ch. 107, sec. 28.)

61. The act of 1794 was not repealed by that of 1831, on the subject of slaves going at large. They were intended to punish different offences, and they are both now retained in the Rev. Stat., ch. 111, secs. 31 and 32. *Ibid.* (See also Rev. Code, ch. 107, secs. 28 and 29.)

62. To constitute the offence under the latter section, it is not necessary that the slave should have hired his time. It is sufficient if the master permit him to go at large as a freeman. *Ibid.*

63. Knowingly to pass a counterfeit bank note, for the sake of gain, to any person, whether he know it to be forged or not, is a crime under the act of 1819. *State v. Harris*, 5 Ired., 287. (See Rev. Code, ch. 34, sec. 61.)

64. In the act to punish the burning of jails, &c., the word "or," before "maliciously," should be construed "and," so that the burning must be both willful and malicious, to constitute the offence provided against. *State v. Mitchell*, 5 Ired., 350. (See Rev. Code, ch. 34, sec. 7.)

65. If a prisoner burn part of a jail, merely for the purpose of effecting his escape, and not with the intent to destroy the build-

ing, he is not guilty under the act. But although his main intent may be to escape, yet if he intends to burn down the building, in order to effect his main design, he is guilty. *Ibid.*

66. If an intent to burn the building exist, the offence is complete, as in arson at common law, however small a part may be consumed. *Ibid.*

67. When a person, who occupies a tract of land over which a public road runs, keeps up a fence across the road, though he did not originally erect it, he is liable to an indictment for a nuisance. *State v. Hunter*, 5 Ired., 369.

68. It is only when the act or acts done by a person, or the omission to act by one who ought to act, operate to the annoyance, detriment or disturbance of the public at large, that the offender is liable to indictment at common law. Hence, a single act drunkenness, though it be in the presence of a crowd, is not indictable, if the persons assembled were not thereby annoyed or disturbed. *State v. Deberry*, 5 Ired., 371.

69. A woman cannot be indicted for keeping a bawdy house, merely because she is unchaste, lives by herself, and habitually admits one or many persons to an illicit intercourse with her. *State v. Evans*, 5 Ired., 603.

70. The offence of keeping a bawdy house consists in keeping a house or room, and therein accommodating and entertaining lewd people in the perpetration of acts of unchastity, meaning acts between persons thus entertained. *Ibid.*

71. Keeping an open shop, and selling goods, on Sunday, is not an indictable offence in this state; profanation of Sunday being punishable here only by certain pecuniary penalties, imposed by the Legislature, and to be recovered before a justice of the peace. *State v. Brooksbank*, 6 Ired., 73. (See Rev. Code, ch. 115, sec. 1.)

72. Falsely, wittingly and corruptly rubbing out, erasing or obliterating a release or acquittance on the back of a note or bond, or elsewhere, does not, according to the law of this state, amount to the crime of forgery. *State v. Thornburg*, 6 Ired., 78.

73. An indictment will lie against any person who erects a fence across a public road which has not been discontinued in the manner directed by the act. *State v. Shuford*, 6 Ired., 162. (See Rev. Code, ch. 101, sec. 2.)

74. Falsely putting a witness's name to a bond, which is not required by law to have a subscribing witness, does not vitiate the bond, and is not a forgery. *State v. Gherkin*, 7 Ired., 206.

75. A free person of color, who is employed to carry a pistol from one place to another, and who claims no right to use the instrument, and has no intention of doing so, is not indictable under the act of 1840, which prohibits free persons of color from having arms in their possession without a license from the coun-

ty court. *State v. Lane*, 8 Ired., 256. (See Rev. Code, ch. 107, sec. 66.)

76. The act of 1846, ch. 70, alters the act in the Rev. Stat., ch. 34, sec. 7, so as to reduce the offence of burning a millhouse, &c., from a felony to a misdemeanor, and substitutes the punishment of fine and imprisonment for that of death. *State v. Upchurch*, 9 Ired., 454. (See Rev. Code, ch. 34, sec. 103.)

77. Where a man is indicted under the statute for "knowingly and fraudulently voting at an election," when he is not qualified to vote, he cannot justify himself by showing, that he was advised by a very respectable gentleman that he had a right to vote; for the maxim, that "ignorance of the law excuses no man," applies as strongly to this case as to any other. *State v. Boyett*, 10 Ired., 336.

78. Permitting a man's slaves to meet and dance on his own premises on Christmas eve, or other holidays, even though other slaves, with the permission of their owners, participate in the enjoyment, and though some of the younger members of the family occasionally join in the dance, does not constitute the offence of keeping a disorderly house, nor any other indictable offence. *State v. Boyce*, 10 Ired., 536.

79. The provisions of the act of 1811, Rev. Stat., ch. 34, sec. 61, punishing the cheating by false tokens, &c., do not apply to the case of conveyances of lands. *State v. Burrows*, 11 Ired., 477. (See Rev. Code, ch. 34, sec. 67.)

80. Where the true ground of complaint was that the defendant, by means of a forged paper, induced the prosecutor to execute a deed calling for 35½ acres of land instead of 55½ acres, thereby defrauding the prosecutor, the indictment should distinctly aver this fraudulent purpose; but though this be a fraud, it does not come within the definition of any crime or misdemeanor, known either to the common or statute law. *Ibid.*

81. In an indictment for selling spirits to a slave, it is no defence to the defendant to show that he did not believe the act to be unlawful. When an act is unlawful and voluntary, the *quo animo* is inferred necessarily from the act itself. *State v. Presnell*, 12 Ired., 103.

82. A proprietor of a mill, who cuts a canal across a public road, whereby the passage along the highway is obstructed, and those who are in possession of the mill, claiming under him and using the canal, are liable to an indictment for such obstruction, the one for creating, and the other for continuing the nuisance. But if a bridge be erected over the canal, neither is indictable simply for suffering the bridge to be out of repair. *State v. Yarrell*, 12 Ired., 130.

83. Where a law imposes a public duty, the omission to perform the duty is indictable; but if it is not an absolute duty, but a conditional one, dependent upon the honest exercise of the

judgment of the person or persons, to whom it is submitted, whether it is to be performed or not, the omission to perform it is not, *per se*, an indictable offence. Thus, where an indictment charged that the wardens of the poor had omitted to make by-laws, rules and regulations for the comfort of the poor, under the act, Rev. Stat., ch. 89, sec. 13, it was held that the indictment would not lie, because the duty imposed upon the wardens by that act was a discretionary one, to be exercised as they might deem expedient. *State v. Williams*, 12 Ired., 172. (See Rev. Code, ch. 86, sec. 10.)

84. One, who votes illegally at an election of a sheriff, cannot defend himself against an indictment, upon the ground that the election was conducted irregularly. *State v. Cohoon*, 12 Ired., 178.

85. Under the Revised Statutes, ch. 111, sec. 31, a master is not indictable for permitting his slave to go at large, hiring his own time; he is only subject to the penalty of forty dollars, imposed by that section of the act; but the owner is indictable under the 32d section of the same act, for permitting a slave to go at large, as a free man, exercising his own discretion in the employment of his time. *State v. Nat*, 13 Ired., 154. (See Rev. Code, ch. 107, sec. 28 and 29.)

86. In an indictment under the act of 1846, ch. 70, for injury to a dwelling house, of which a lessee, whose term is unexpired, has the actual possession, the property must be stated in the lessee. But the act does not embrace the case of destruction or damage to buildings, &c., by the owner himself; and, in law, the lessee is the owner during the continuance of his term. *State v. Mason*, 13 Ired., 341. (See Rev. Code, ch. 34, sec. 103.)

87. The 12th section of the 34th chapter of Rev. Stat., in regard to the offence of taking and conveying a free negro out of the State, with intent to sell him as a slave, includes only cases in which the taking is by violence; and does not extend to cases where the free negro is induced to go by persuasion, seduction or deception. *State v. Weaver*, Busb. 9. (The law is now altered, so as to embrace a case like the present, see Rev. Code, ch. 34, s c 12.)

88. The keeper of a shop for the sale of spirituous liquors, who permits the promiscuous assembling about his shop of persons, who cause disturbance by loud noises, quarreling and swearing, such disturbance being the probable consequence of his conduct, is indictable for keeping a disorderly house. *State v. Thornton*, Busb 252.

89. It is a misdemeanor in office, for a justice to sell or transfer a judgment rendered by himself, or by any other justice, if in his possession, *virtute officii*; the law making it his duty to keep and preserve such judgments. *State v. Zachary*, Busb., 432.

90. An indictment will lie against one who sells spirits to a slave, though he has a permit from his master, which states that

the defendant might sell and deliver to said slave "ardent spirits, whenever he shall apply for the same during the present year," such permit being void, as being in evasion of the act of assembly. *State v. Hyman*, 1 Jones, 59. (See Rev. Code, ch. 34, sec. 87.)

91. It is not indictable to deliver spirituous liquors to a slave at night, upon the order of his overseer, for the overseer's use. *State v. McNair*, 1 Jones, 180.

92. Where, by a private act of assembly, a county court was forbidden to grant a license to retail spirituous liquors by the small measure, within the limits of an incorporated town, without a written recommendation from the commissioners of such town, and it appeared from the records of the county court that they granted a license to retail in such town, without such written recommendation, the person obtaining such license is not thereby protected from an indictment. *State v. Moore*, 1 Jones, 276.

93. Where the defendant sold a quart of spirituous liquor, under an agreement that the seller was to retain it in a separate vessel, and the buyer was to have access to it when he pleased, and, under this agreement, he drank the whole at various times, *it was held* that, in the absence of proof that the parties intended the trade as an artifice to evade the statute, the transaction was not an indictable offence. *State v. Bell*, 2 Jones, 337.

94. Whenever a duty is imposed upon certain persons by law, the performance of which duty concerns the public, the omission to perform it is an indictable offence. *State v. Commissioners of Raleigh*, 3 Jones, 399.

95. Where the commissioners of a town are *empowered* and *required*, to use certain means for having the streets of the town kept in repair, and the inhabitants of the town are by the same act exempt from working on the streets, the commissioners are indictable if they neglect to perform the duties required of them. *Ibid.*

96. Where, on the trial of an indictment for trading with slaves, the agent of the defendant testified that he had general instructions from his principal, not to traffic with slaves without a written permit; *it was held* that although this, if true, threw the *onus* upon the State of further proof of the defendant's guilt, yet the judge might leave the enquiries to the jury, whether these instructions had been abrogated, and whether the defendant had specially approved of the act. *State v. Privett*, 4 Jones, 100.

97. Where a slave handed to a free negro, in the shop of a retailer of spirits, money which he immediately handed to the retailer, who in return delivered him a quantity of spirits which he immediately handed to the slave, *it was held* that the free negro was not guilty, under either of the acts, Rev. Code, ch.

34, sec. 87, or ch. 107, sec. 67, of *selling* or *giving* spirits to the slave. *State v. Hopkins*, 4 Jones, 305. S. P., *State v. Wright*, 4 Jones, 308.

98. If a statute, upon which a bill of indictment has been found, be repealed, the indictment can no longer be sustained. *State v. Cress*, 4 Jones, 421.

99. If one person, by such abusive language towards another as is calculated and intended to bring on a fight, induces the other to strike him, he is guilty of an affray, though he may be unable to return the blow. *State v. Perry*, 5 Jones, 9.

100. An indictment will lie against one who gives an unlawful vote, though he and others may have thought it to be lawful, and even the fact that the inspectors of the election thought it was lawful for him to vote will be no defence, if they did not decide so upon a full statement of the facts made to them. *State v. Hart*, 6 Jones, 389.

101. An indictment for arson for burning a house, built for a dwelling house, but uninhabited at the time, cannot be sustained for the felony mentioned in the 2d section of the 34th chapter of the Rev. Code, but may be for the misdemeanor mentioned in the 103d section of the same act; and upon a verdict of guilty, judgment may be pronounced upon the prisoner for the misdemeanor. *State v. Clark*, 7 Jones, 167.

102. A person to whom a free negro is hired by the court, for the payment of a fine under the act, Rev. Code, ch. 107, sec. 75, is indictable for beating him for an unlawful purpose, or for malice. *State v. Norman*, 8 Jones, 220.

103. The willful and malicious setting fire to the house of another, the burning of which is only a misdemeanor, will become a capital felony, if a dwelling house, or barn with grain in it, be thereby burnt, where such burning is the probable consequence of the first illegal act. *State v. Laughlin*, 8 Jones, 354.

104. The burning of a *crib*, with grain in it, is not within the meaning of the Rev. Code, ch. 34, sec. 2, which makes it a capital felony to burn a *barn* with grain in it, the buildings not being the same, either in law or in fact. *Ibid.*

105. A house seventeen feet long and twelve feet wide, setting on blocks in a stable yard, having two rooms in it, one quite small used for storing refuse corn, and the other used for storing peas, oats, and other products of the farm, is not a barn within the meaning of the statute, Rev. Code, ch. 34, sec. 2, the burning of which is made a capital felony. *State v. Laughlin*, 8 Jones, 455.

106. A house eighteen feet long and fifteen feet wide, built of logs notched up, the cracks inside covered with rough boards, having a good plank floor and a door about four feet high, and containing, at the time of the burning, a quantity of corn, peas and oats, is not a barn within the meaning of the statute, Rev.

Code, ch. 34, sec. 2, though it was the only building on the farm used for storing the crop. *State v. Jim*, 8 Jones, 459.

107. Buying of, and receiving from, a slave, corn, or other forbidden articles, on the slave's own account, is indictable under the Rev. Code, ch. 34, sec. 85, though the owner, without the knowledge of the trade, is present, and knows what is going on, but has given no *written* permission for the trading. *State v. Honeycut*, 2 Winst., 51.

108. If a slave, living in a house to himself, keeps a boarding house for his own livelihood, and the master, knowing it, exercises no control over him or his business, it is an indictable offence within the Rev. Code, ch. 107, sec. 29. *State v. Brown*, 2 Winst., 54.

See (Arrest, 4-5.) (Cattle and other live stock, 6.) (Contempt, 7.) (Felony.) (Justices of the peace—Of the responsibility of Justices, 2.) (Highway, 3-4-5-7-13-33-43.) (Gaming—What gaming is made indictable.)

II. FORM AND MATTERS RELATING THERETO.

1. In an indictment for murder, the offence must be charged in the body of the bill, to have been committed within the district, over which the court has jurisdiction; it is not sufficient that the caption names the district. Thus, when the State was divided into districts, an indictment, charging the offence to have been committed in Beaufort county, without adding "in the district of Newbern," was arrested. *State v. Adams*, Mar., 30, (21.)

2. The length and depth of a wound need not be stated in an indictment for murder. *United States v. Mannier*, 2 Mar., 79, (134.) (*State v. Owen*, 1 Murph., 452, is *contra*, but such description is rendered unnecessary by statute. Rev. Code, ch. 35, sec. 14. *State v. Moses*, 2 Dev., 452.)

3. Things written may be described in an indictment, either by the tenor, or according to the substance. If by the tenor, the very words must be followed, though the omission of a letter, not altering the word, is not fatal: if by the substance, you need not use the very words, but if you describe the same sense and meaning it will do. As to words spoken, there can be no tenor of them; and therefore, where the sense and meaning of the words set down in the indictment are precisely the same with those proved in evidence, though not the very same words, the evidence will support the indictment; but then the meaning must be evidently the same, without the help of any implication or any thing extrinsic. *State v. Bradley*, 1 Hay., 403, (464) and 463, (533.) S. P., *State v. Caffey*, N. C. Term, Rep. 272, (694.) S. C., 2 Murph., 320.

4. An indictment in the county court for extortion, stating

the day on which the offence was committed in *figures*, and also omitting the word *extorsively* in charging the taking the unlawful fee, may be supported under the act of 1784. (See Rev. Code, ch. 35, sec. 14.) *State v. Dickens*, 1 Hay., 406, (468.)

5. An indictment for larceny should state in whom the property was, or that it was the property of some person unknown, if the fact were so. To omit this is a fatal defect. *State v. Haddock*, 2 Hay., 162, (348.)

6. The omission of a figure in the description of an instrument forged, in an indictment for forgery, is fatal. *State v. Street*, Tay., 158, (98.)

7. The words "good and lawful men," in the caption of an indictment, inquest, &c., mean freeholders. *State v. Glasgow*, Conf. Rep. 38, (176.)

8. In an indictment for murder, the omission of the letter "a" in the word "breast," in the description of the place of the wound was held to be fatal. *State v. Carter*, Conf. Rep., 210, (317.) S. C., 2 Hay., 140, (312.) *Quære*, whether it would be so now. See Rev. Code, ch. 35, sec. 14.)

9. An indictment charging the offence to have been committed in November, 1801, and in the 25th year of American Independence, held to be bad, and the judgment arrested, because the offence is charged to have been committed in two different years. *State v. Hendricks*, Conf. Rep., 369, (445.)

10. It is not essential to the validity of an indictment that it should be signed by the prosecuting officer. *State v. Vincent*, 1 Car. L. R., 493, (105.)

11. The caption of an indictment must describe the court before which it is found, so that it may be seen that the court can exercise jurisdiction over the offence charged. *State v. Sutton*, 1 Murph., 281. (Overruled, see *State v. Wasden*, N. C. Term Rep., 163, (596.)

12. The prosecuting officer for the State has a discretionary power to endorse the governor as prosecutor on bills of indictment, whenever he may think the public interest requires it. *State v. English*, 1 Murph., 435.

13. In an indictment for murder where the death is caused by a wound, bruise or other assault, the stroke must be expressly laid. But an indictment charging "that A. B., with a certain stick, &c., in and upon the head and face of C. D., then and there did strike and beat, giving to the said C. D., then and there, with the stick aforesaid, in and upon the head and face of the said C. D., several mortal wounds, of which said several mortal wounds the said C. D. instantly died," is good; for there is in the first clause a direct allegation of a stroke, and the participle *giving*, and the words *then and there*, connect the allegation with the *mortal wounds* in the second clause. *State v. Owen*, 1 Murph., 452.

14. In an indictment charging "that A feloniously and of his malice aforethought assaulted B, and with a sword, &c., then and there struck him," &c., the first allegation of *feloniously and of his malice aforethought*, applied to the assault, extends also to the stroke to which it is essential. *Ibid.*

15. When, in an indictment for murder, the death is charged to be caused by a wound, a description of the wound must be set forth in the indictment, its length, breadth, depth, &c., where they are capable of description; and the omission of such description is fatal to the indictment. But when the death is caused by a bruise, a description of its dimensions, &c., is not necessary. *Ibid.* (See *State v. Moses*, 1 Dev., 452, and Rev. Code, ch. 35, sec. 14.)

16. An indictment on a recent statute is sufficient, if it state a time, which is after the statute went into operation, and aver that the act was done "against the form of statute in such case made and provided." *State v. Ballard*, 2 Murph. 186.

17. In an indictment for forging a bond, attested by a witness, it is not necessary to describe it as being attested by the witness, attestation not being essential to the instrument as a bond. *Ibid.*

18. In an indictment against an individual, it is not necessary to describe him by the addition of his occupation, &c. *State v. Newmans*, 2 Car. L. R., 74, (171.)

19. An indictment for stealing a slave must charge the property to be in the executor, and not as that "of the deceased" testator. *State v. Davis*, 2 Car. L. R., 291, (271.)

20. An indictment, stating that the defendant, on a certain day and year, with force and arms, *at and in* a certain county, a male slave, called, &c., the property, &c., of the said county, feloniously, &c., is sufficient, after a verdict, without the words "then and there being found," or what is technically called the *ad tunc et ibidem*. *State v. Sparrow*, N. C. Term R., 93, (530.)

21. A caption to an indictment is only necessary when the court sits under a special commission; and a mistake in the caption will not hurt an indictment found in a court, which sits by the authority of a public law. *State v. Wasden*, N. C. Term R., 163, (596.)

22. An indictment for perjury in swearing to an affidavit was "in substance and effect following," &c., and then assigned that defendant swore he did not know a writ was returned against him in the above *suit*, whereas the affidavit had the word *case* instead of *suit*, held that the variance was immaterial, as the indictment did not profess to give the *tenor*. *State v. Caffey*, 2 Murph. 320, S. C. N. C. Term R., 272, (694.)

23. An indictment, charging the defendant with forging a receipt against a "book account," is too indefinite. The term is not known to the law, and, in common parlance, may mean

money, goods, labor, or whatever may be brought into account. Had the charge been forging an acquittance for goods, the evidence of forging the paper described in the indictment would have been proper for the jury. The paper described was: "Sept. 3d, 1816. Received of James Dalton his book account in full. John Logan." *State v. Dalton*, 2 Murph., 379.

24. At common law rape was a felony, but it was afterwards changed to a misdemeanor, before the stat. of West. 1st. By that statute the *punishment* was mitigated, but by stat. West. 2nd, the *offence* was again changed to a felony, and *hence* its present punishment *as a felony* is by statute, and consequently an indictment for rape must conclude against the form of the statute. *State v. Dick*, 2 Murph., 388.

25. An indictment for breaking a dwelling house in the day time, no person being therein, and feloniously taking a bank note of the value of five pounds, ought formerly to have concluded against the *form of the statutes*, to make out a capital felony, because it depended for that purpose on the two statutes of 1806 and 1811. *State v. Jim*, 3 Murph., 3. (The act of 1806 which formed the 8th section of the Rev. Statutes, ch. 34, was repealed by the act of 1844, ch. 22, and of course is not contained in the Rev. Code.)

26. If a statute create an offence, or alter an offence at common law, as by turning a misdemeanor into a felony, the indictment must conclude against the form of the statute; and if an offence be made so, not by one statute only, but by two or more taken together, the indictment must conclude against the form of the statutes. *Ibid.* (The defect of concluding against the form of the statute, when there are two statutes, and *vice versa*, is now cured by Rev. Code, ch. 35, sec. 20.)

27. An indictment for murder, which sets forth the *time and place of making the assault*, although it does not repeat them as to the *mortal blow*, may be sustained by virtue of the act of 1811. *State v. Cherry*, 3 Murph., 7. (See Rev. Code, ch. 35, sec. 14.)

28. An indictment under the act of 1779 charged that A did "steal, take and carry away" a slave, &c., "contrary to the act of the general assembly in such case made and provided;" *held* that the benefit of clergy was taken away on a conviction on this indictment, although it does not charge that the stealing was *with an intent to sell or dispose of to another, or appropriate to his own use*. *State v. Jernigan*, 3 Murph., 12. (The act concerning the stealing, &c., of slaves is altered in several particulars. See Rev. Code, ch. 34, sec. 10.)

29. An indictment is a compound of law and fact, and must be such that the court can see what is the alleged offence. Hence it is not sufficient to charge "that the defendant was a common Sabbath breaker and profaner of the Lord's day, commonly called Sunday, and, that he, on divers Lord's days, being Sundays, did

keep a certain open shop, and then and there sold and exposed to sale divers goods, wares and spirituous liquors to negroes and others, to the great damage of the good citizens of the State," &c. *State v. Brown*, 3 Murph., 234.

30. An indictment, which charges "that the defendant was a common gross and notorious drunkard, and that he, on divers days and times, got grossly drunk," is not sufficient, because it is not stated that the offence was committed in public, so as to make it a common nuisance. *State v. Waller*, 3 Murph., 229.

31. In an indictment for a riot in pulling down a dwelling house, it must be set forth whose house it is. If a person inhabit a dwelling house as the wife, guest, servant, or part of the family of another, it is in law the occupation of such other person, and must be so laid in the indictment, and not as the occupation of the wife, guest or servant. *State v. Martin*, 3 Murph., 533.

32. In an indictment for the murder of a slave, it need not be stated whose property the slave is, and if it be stated, it is a question, whether it need be proved as laid in the indictment. *State v. Scott*, 1 Hawks, 24.

33. All that is necessary with regard to laying the time in an indictment, is that the offence shall appear to have been committed before the finding of the bill, except in those cases where the time forms part of the offence. *State v. Haney*, 1 Hawks, 460.

34. In general, the time is not traversable, and if it be laid after a *scilicet*, and be repugnant to the time laid in a former part of the indictment, the *scilicet* must be rejected as surplusage. *Ibid.*

35. In an indictment for sending a challenge, it is not necessary to set out a copy of the challenge; and if an attempt be made to do so, and it varies slightly from the original, as by the addition or omission of a letter, no way altering the sense, the variance is not fatal, and is cured after verdict. *State v. Farrier*, 1 Hawks, 487.

36. An indictment for forgery should not only set forth the tenor of the bill or note, but should *profess* to do so. *State v. Twitty*, 2 Hawks, 248.

37. In an indictment under the act of 1819, to punish the making, &c., of counterfeit bank notes, if the note, alleged to have been passed, be of a bank not within the State, the indictment should aver that such bank exists, by which the counterfeit note purports to have been issued. *Ibid.* (See Rev. Code, ch. 34, sec. 60.)

38. Where an indictment is framed on a statute of thirty years standing, which prohibits an offence after a specified time, it is not usual or necessary that it should allege expressly that the offence

was committed after the making of the statute; otherwise if the statute be a recent one. *State v. Chandler*, 2 Hawks, 439.

39. If a bill of indictment be found *true*, the name of the foreman of the grand jury subscribed with the initials F. G. J., or without any addition at all, is sufficient, if it appear from the records of the court, that the person whose name is subscribed, is the foreman of the grand jury. *Ibid.*

40. In an indictment, the words "false, forged and counterfeited promissory note, commonly called a bank note, purporting to be a good and genuine bank note of one hundred dollars, on the bank of the State of South Carolina," contain a sufficient averment of the existence of such a bank as the bank of the State of South Carolina. *State v. Ward*, 2 Hawks, 443.

41. Where an indictment charges a defendant with forging a bank note "purporting to have been issued, &c., promising to pay, &c.," it must be understood as description of a bill, purporting to promise, as well as purporting to have been issued. *State v. Twitty*, 2 Hawks, 449.

42. An indictment, containing in its caption a statement of the term in these words, "fall term, 1822," and in the body of the indictment charging the time of the offence in these words, "on the first day of August in the present year," was held good. There is no necessity for stating any time in the caption of an indictment found in the county or superior courts. *State v. Haddock*, 2 Hawks, 461.

43. An indictment for murder, which stated that A. B., "late of Bladen county, &c., with force and arms," &c., was held to contain a sufficient description of the place where the murder was alleged to have been committed. *State v. Loman*, 3 Hawks, 175.

44. If an indictment charge an offence to have been committed on a day which is yet to come, it is as defective as if no day were laid. *State v. Sexton*, 3 Hawks, 184.

45. Indictments are not within the statutes of *jeofails*; being found by a grand jury upon oath, the court cannot amend them without the concurrence of the grand jury which found them. *Id.*

46. An indictment charging defendant with having in his possession "one pair of dies, upon which were made the likeness, similitude, figure and resemblance of the sides of a lawful Spanishmilled silver dollar, &c., for the purpose of making and counterfeiting money in the likeness and similitude of Spanishmilled silver dollars," was held to charge with sufficient certainty the offence designated in the act of 1811. *State v. Collins*, 3 Hawks, 191. (See Rev. Code, ch. 34. sec. 65.)

47. An indictment charging that the defendant "with force and arms at the house of one S. R., situate, &c., did then and there, wickedly, maliciously and mischievously, and to the terror and dismay of the said S. R., fire several guns," is sufficient as

an indictment for a forcible trespass, as distinguished from a mere civil trespass. *State v. Langford*, 3 Hawks., 381.

48. It is improper to lay an offence to have been committed after the finding of the indictment; but if a day certain be laid *before*, the other may be rejected as surplusage. *State v. Woodman*, 3 Hawks., 384.

49. In an indictment for stealing a bank note, a description of it in the following words "one twenty dollar bank note on the State Bank of North Carolina, of the value of twenty dollars," is good. *State v. Rout*, 3 Hawks., 618.

50. An indictment under the act of 1811, concerning the use of false tokens, &c., should state that the cheat was accomplished by means of some token or false contrivance, calculated to impose on the credulity of ordinary men. A mere lie is not within the meaning of the act. *State v. Simpson*, 3 Hawks., 620. (See Rev. Code, ch. 34, sec. 67.)

51. Promissory notes are not of themselves public tokens, while bank notes are; therefore, an indictment for a cheat at common law, by passing certain "promissory notes" as, and for bank notes, without stating that they resembled bank notes, cannot be sustained. *State v. Patillo*, 4 Hawks., 348.

52. An indictment charging that the defendant stole "a parcel of oats" is sufficiently certain. *State v. Brown*, 1 Dev., 137.

53. An indictment for murder, in which it does not appear that the death happened within a year and a day after the wound was inflicted, is fatally defective. *State v. Orrell*, 1 Dev., 139.

54. In an indictment for homicide, it must appear that the deceased died in the county in which the bill is found. *Ibid.* (Prisoner to be indicted in the county where the assault was made whether the deceased died in another county of the State, or out of the State. See Rev. Code, ch. 35, sec. 27 and 28.)

55. In an indictment for a rape, or for an assault with an intent to commit a rape by a colored person, the words "forcibly and against her will" are essentially necessary. *State v. Jim*, 1 Dev., 142. (See Rev. Code, ch. 107, sec. 44.)

56. In an indictment, false spelling, which does not alter the meaning of the word misspelt, is no ground for an arrest of the judgment. *State v. Molier*, 1 Dev., 263.

57. An indictment, under the act of 1825, for concealing a slave on board of a ship with intent, &c., which did not charge the prisoner to be in any way connected with the ship, in which the slave was alleged to have been concealed, was held to be fatally defective. *State v. Johnson*, 1 Dev., 360. (The act of 1825 is combined with others, and modified in the Rev. Code, ch. 34, sec. 11.)

58. The misspelling a name in an indictment, where the sound is not altered, is unimportant. *State v. Upton*, 1 Dev., 513.

59. To constitute forgery at the common law, the intent to de-

fraud must either be apparent from the false making, or become so by extrinsic facts; therefore an indictment, which charged the false making to have been in the alteration of an order given by the defendant, without charging that the alteration was made after it was circulated, and had been taken up by him, was held to be fatally erroneous. *State v. Greenlee*, 1 Dev., 523.

60. An indictment on the acts of assembly, prohibiting the sale of spirituous liquors by a measure less than a quart, which charges the retailing to be "by the small measure" is defective; the words "less than a quart" should be added to the above description. *State v. Shaw*, 2 Dev., 198.

61. Where one statute creates an offence, imposes a penalty and gives an action to recover it, and another makes the offence indictable, as in the case of overseers of public roads, the indictment should conclude "against the form of the statutes." *State v. Pool*, 2 Dev., 202. (This is not now material. See Rev. Code, ch. 35, sec. 20.)

62. An indictment on a statute need not negative a proviso, which withdraws a case from its operation; but where the proviso adds a qualification to the enactment, so as to bring a case within it, which, but for the proviso, would be without the statute, the indictment must show the case to be within the proviso; therefore an indictment under the act of 1790, against bigamy, which avers that the first wife was living at the time of the second marriage, is good, without an averment that the first marriage then subsisted. *State v. Norman*, 2 Dev., 222. (See Rev. Code, ch. 34, sec. 15.)

63. In an indictment for forcible trespass upon personal property, actual possession by the prosecutor must be averred; but an averment of the legal possession of the prosecutor and "that the defendants, with strong hand, unlawfully, violently and forcibly did seize, arrest and take from the prosecutor," &c., was held sufficient. *State v. Mills*, 2 Dev., 420.

64. An indictment for forgery must contain an exact copy of the forged instrument. And when a bank note had been forged by raising its amount, and the sum mentioned in its body had been erased and never filled up again, it was held that it was proper to set it out with a blank. *State v. Dourden*, 2 Dev., 443.

65. As a bank note from its tenor purports to be of value, it is unnecessary to aver in the indictment that it was for a specific sum. And an averment of the legal validity of an instrument is never necessary in indictments for forgery, unless the instrument may, or may not, from its tenor, be of any validity. *Ibid.*

66. By the act of 1811, all defects in indictments are cured, except the omission of an averment of facts and circumstances, which constitute the crime charged. Nothing need be stated, of which proof is not required on the trial; therefore, in an in-

dictment for murder, it is necessary to aver that a mortal wound was given, but the size and nature of the wound being matters not material to the description of the offence, nor a necessary part of the evidence, its dimensions need not be stated. *State v. Moses*, 2 Dev., 452.

67. An indictment concluding "and the jurors," &c., omitting the word "so" is sufficient. *Ibid.*

68. An averment of the time, when an offence was committed, is unnecessary, unless the time is a constituent part of the offence. Such an averment is frequently made, where offences after a certain specified day are made criminal, or where the statute increases the punishment; but *it seems* that it is not now necessary in any case. *State v. Sam*, 2 Dev., 567.

69. An endorsement by the foreman of the grand jury of the initial letter of his christian name, where the record of his appointment states his name at length, is not a material variance. *State v. Collins*, 3 Dev., 117.

70. In an indictment against a person "of color for an attempt to commit a rape upon a white female, it is necessary to charge that the assault was made with an intent to commit a rape. An allegation that the prisoner feloniously attempted to ravish is insufficient. *State v. Martin*, 3 Dev., 329.

71. Where acts are laid in an indictment at several times, without any certain day as to any of the acts, the indictment is bad altogether; but where they are laid on some day certain, and also on other days uncertain, it is void only as to the uncertain days, and sufficient as to the parts to which the certain time is annexed. *State v. Jasper*, 4 Dev., 323.

72. Where a county is named, even in the caption or margin of an indictment, the words "in said county," or "in the county aforesaid," in the body of the indictment, will have sufficient reference to the county in the margin or caption. *State v. May*, 4 Dev. 328.

73. In an indictment for stealing a slave, it is sufficient to set forth the name of the owner of the slave after a *scilicet*. *Ibid.*

74. The commissioners of a town are not, of common right, bound to repair the streets, and therefore an indictment against them, for not repairing, must set forth how that obligation has been imposed upon them. *State v. Commissioners of Halifax*, 4 Dev., 345.

75. In an indictment against the commissioners of a town, it is not sufficient to allege a general breach of duty, but the indictment must charge specifically, which of the duties imposed has been neglected. *Ibid.*

76. When an indictment is founded on a private statute, the statute must be set forth. *State v. Cobb*, 1 Dev. and Bat., 115.

77. An indictment for biting off the ear, under the 2nd section of the act of 1791, must state the offence to have been done "on

purpose," as well as unlawfully. *State v. Ormond*, 1 Dev. and Bat., 119. (See Rev. Code, ch. 34, sec. 47.)

78. In an indictment for a nuisance, if the facts charged must, from their very nature, have created a nuisance to the citizens in general, the words "to the common nuisance" may be omitted. But if the facts charged show an offence inconvenient and troublesome, that *may* have extended its annoyance to the community, or may have reached only certain individuals of that community, those words become indispensable. *State v. Baldwin*, 1 Dev. and Bat., 195.

79. But an allegation in an indictment, that certain facts charged were "to the common nuisance of all the good citizens of the State," will not make it a good indictment for a common nuisance, unless those facts be of such a nature as *may* justify that conclusion, as one of law, as well as of fact. *Ibid.*

80. An indictment under the act of 1826, charging that the defendant, on a particular day, and on divers other days, before that day, sold and delivered spirits to certain slaves, whose names were to the jurors unknown, is defective for uncertainty, in embracing the transactions of divers days with divers persons. And as the names of the slaves were not given, it is also defective for not stating the owners of the slaves, or averring that the owners were unknown, if the fact were so. *State v. Blythe*, 1 Dev. and Bat., 199. (See Rev. Code, ch. 34, sec. 87.)

81. *It seems* that a slave may be described by his name alone, but it is better for the name of the owner to be given also. *Ibid.*

82. An indictment, which charges an indecent and scandalous exposure of the naked person, "to public view in a public place," is sufficient, without charging the act to have been committed in the presence of one or more of the citizens of the State. *State v. Roper*, 1 Dev. and Bat., 208.

83. *It seems* that signing the name of the foreman to the endorsement of "a true bill" on a bill of indictment, though a salutary practice, is not essential to its validity. But whether this be so or not, a variance between the name of the foreman, as appearing upon the record of his appointment, and his signature upon the bill, is immaterial, for his identity must necessarily be known to the court, and the receiving and recording the bill with his endorsement establishes it. *State v. Calhoun*, 1 Dev. and Bat., 374.

84. Where an indictment charged, in effect, that the defendant, a constable, falsely affirmed that a note for the payment of money was a forthcoming bond, and that, by means of such falsehood, the defendant deceitfully prevailed on the prosecutor to execute a promissory note for the payment of a sum of money, *it was held* that the charge was too vague and uncertain, in not stating how the result was produced by the falsehood practiced. *State v. Fitzgerald*, 1 Dev. and Bat., 408.

85. Legal terms in an indictment must be understood in their legal sense, unless, by other sufficient and plain words, another meaning is impressed upon them. *Ibid.*

86. It is a general rule in indictments that "the special manner of the whole fact ought to be set forth with such certainty, that it may judicially appear to the court, that the indictors have not gone on insufficient premises." *Ibid.*

87. In an indictment under the act of 1830, against a white man for playing cards with a slave, it is sufficient to charge that the defendant "unlawfully did play at a game of cards," without specifying the name of the particular game played with the cards. *State v. Ritchie*, 2 Dev. and Bat., 29. (See Rev. Code, ch. 34, sec. 116.)

89. In an indictment on a statute, no allegation of unlawfulness, nor of being against the statute, nor any conclusion, will make good the indictment, if it do not bring the fact prohibited or commanded, in the doing or not doing of which the offence consists, within the material words of the statute. Hence, if the statute forbids the doing of a particular act, without the authority of either one of two things, the indictment must negative the existence of both these things before it can be supported. *State v. Loftin*, 2 Dev. and Bat., 31.

89. An indictment for the murder of a slave may conclude at the common law. *State v. Samuel*, 2 Dev. and Bat., 177.

90. An indictment, for a forcible trespass to chattels, must charge the trespass to have been committed in the presence of the owner, and the taking to have been from his actual possession. *State v. Love*, 2 Dev. and Bat., 267.

91. All crimes, which are capital, are felonies; although that term be not used in the statutes creating them. The office of the term, *felonice*, is to describe the intent at the instant of doing a criminal act, to apprise the court of the measure of the punishment, and to regulate the form of the trial. It has no synonym, and is not dispensed with by the act of 1811, regulating proceedings on indictments, for it is a matter of substance and cannot be dispensed with. *State v. Jesse*, 2 Dev. and Bat., 297. (See Rev. Code, ch. 35, sec. 14.)

92. An indictment, charging that the defendant did "falsely forge, and willingly assent to the falsely making," &c., following the words of the statute, is in accordance with precedents and is sufficient. *State v. Morgan*, 2 Dev. and Bat., 348.

93. An indictment, under the act of 1779, which charges the seduction of a slave to be with an intent "to sell, dispose of and convert to his own use," is sufficient; for the felony created by the act is sufficiently described, by charging the seduction to be with an intent "to sell," and the words, "dispose of and appropriate to his own use," do not extend the intention imputed, beyond that of an intention to sell, and at most are only redundant. And

charging the taking to be "by violence, seduction or other means," is not repugnant, as both violence and seduction may have been used; but if it were double, it is aided by a verdict, finding the taking to be "by seduction" only. The words, "other means," if used alone, would be too indefinite, but taken in connection with the words "by violence and seduction," they are merely superfluous. *State v. Haney*, 2 Dev. and Bat., 390. (See Rev. Code, ch. 34, sec. 10, by which the former law on the subject is somewhat altered.)

94. The slave need not be charged to be of any value. *Ibid.*

95. A crime, which may be committed by the agency of several means, is well described, if charged to be by the agency of all, as a forgery may be charged to have been by false making, and by procuring to be falsely made. *Ibid.*

96. An unnecessary averment, which renders an indictment ungrammatical, does not vitiate it, although it should be carefully avoided. *Ibid.*

97. An indictment against a justice of the peace, for refusing to issue his warrant for the arrest of a felon, must charge, either that the felony was committed in his presence, or a tender of an affidavit of its commission. It should also charge that the felon was in the magistrate's county when the refusal occurred. *State v. Leigh*, 3 Dev. and Bat., 127.

98. In an indictment for retailing spirituous liquors by the small measure without a license, under the statute of 1825, it is necessary to aver that the retailing was to some particular person or persons, or to some person or persons to the jurors unknown. *State v. Faucett*, 4 Dev. and Bat., 107. (See Rev. Code, ch. 34, sec. 94.)

99. In an indictment under the statute for abusing and carnally knowing a female child under the age of ten years, which charges the rape to be "in and upon one M. C., an infant under ten years of age," &c., "and *her*, the said M. C., feloniously did unlawfully and carnally know and abuse," &c., is sufficient without describing the infant as a "female child," nor is the addition of "spinster," to the name of the infant, requisite in such an indictment. *State v. Terry*, 4 Dev. and Bat., 152.

100. In indictments for offences against the persons or property of individuals, no addition to the names of those individuals is requisite. *Ibid.*

101. An indictment for a conspiracy to destroy a warrant in the name of the State, issued against a defendant on a criminal charge, and a recognizance for the appearance of the said defendant to answer such charge, with the intent thereby to impede the due administration of justice, should *positively aver* that such warrant did issue, and such a recognizance was acknowledged, and should also set forth as much of the warrant and recognizance as is necessary to show that they were valid, and,

therefore, that the destruction of them might be prejudicial to the administration of justice. Hence, if the warrant and recognizance be mentioned only by way of reference and recital, and it be not stated with any precision by whom the warrant was issued, nor before whom the recognizance was taken, and if the substance of the warrant and recognizance be not set forth, so that it may be seen whether they, or either of them, had legal validity, the indictment will be insufficient. *State v. Enloe*, 4 Dev. and Bat., 373.

102. An indictment for forging a bond, against one of the obligors therein, may allege the forgery of the whole instrument by him. *State v. Gardner*, 1 Ired., 27.

103. An indictment charging the forging of "a certain bond," instead of "a certain paper writing, purporting to be a bond," is good. *Ibid.*

104. In an indictment for a riot, it is necessary to aver, and on the trial to prove, a previous unlawful assembly; and, hence, if the assembly were lawful, as upon a summons to assist an officer in the execution of lawful process, the subsequent illegal conduct, of the persons so assembled, will not make them rioters. *State v. Stalcup*, 1 Ired., 30.

105. An indictment ought to be certain to every intent, and without any intendment to the contrary. But if the sense be clear, and the charge sufficiently explicit to support itself, nice objections ought not to be regarded. *State v. Fore*, 1 Ired., 378.

106. It is generally proper and necessary to describe, in an indictment, an offence created by statute, in the words of the statute. But there are a few exceptions to the rule. *State v. Stanton*, 1 Ired., 424.

107. In an indictment under the act "for showing forth in evidence" a forged instrument, although "the showing forth" must be proved to have been in a judicial proceeding, yet it is not necessary to state in the indictment, in what suit or judicial proceeding it was "shown forth." It is sufficient to state the charge in the words of the act. *Ibid.* (See Rev. Code, ch. 34, sec. 59.)

108. Where a person is called in an indictment "Deadenea," and it is proved her name was "Diadenea," the variance is immaterial. *State v. Patterson*, 2 Ired., 346.

109. Where one is indicted for refusing to assist an officer in securing a person whom he has arrested, it is not sufficient to state in the indictment that this was an arrest by *lawful authority*; the authority to arrest must be set forth in the indictment. *State v. Shaw*, 3 Ired., 20.

110. In an indictment for murder, where the assault is alleged to have been committed in some one county of this state, and the death to have occurred in another state, it is not necessary that the indictment should conclude *against the form of the stat-*

ute; for, by the statute, no offence is newly created, nor raised to a higher offence, nor an additional punishment annexed. *State v. Dunkley*, 3 Ired., 116. (See Rev. Code, ch. 35, sec. 28.)

111. That part of the definition of murder, expressed in the terms "the King's peace," refers not to the place of the assault and death, but to the state and condition of the person slain, as being or not being entitled to the protection of English laws; for example, whether he be a subject, or an alien enemy, or traitor in arms, or, in more ancient times, an infidel, or a person guilty of *proemunire*. *Ibid.*

112. An indictment, which charged that A. B. did construct and use a public gaming place in the town of H., in the county of H., at which a certain game of chance was played, and that the defendant at the said town of H. did play at the said game, "and did *then and there* bet money with the said A. B., at and upon said game," is not good. It does not sufficiently charge that the playing and betting by the defendant were at any public gaming place; the words "then and there" having reference only to the time and the *venue*, the county of H., and not to the public place of gaming before mentioned. *State v. Langford*, 3 Ired., 354.

113. An indictment against an individual for permitting a public bridge to become ruinous, which he was bound to repair, must set forth *how* he became subject to the duty of making repairs. *State v. King*, 3 Ired., 411.

114. Where the county is mentioned in the caption of an indictment, the last of the words "then and there," in the body of the bill, will be understood as referring to that county. *State v. Bell*, 3 Ired., 506.

115. A room in a large building, which room was separately leased by the owner of the building to a merchant, who occupied it as a store, it having no direct communication with the other parts of the building, is properly laid, in an indictment for arson, as the property of the lessee. *State v. Sandy*, 3 Ired., 570.

116. Where there is but *one* statute, an indictment, which concludes against the form of the *statutes*, is bad, and, after conviction, judgment will be arrested. Where there are *more than one* statute, a conclusion against the form of *the statute*, is also bad. *Ibid.* (The defect is now cured. See Rev. Code, ch. 35, sec. 20.)

117. Where a particular class of persons, other than the public overseers of roads, are indicted for not keeping a road in order, the indictment should contain an averment "that it was their duty, and of right they ought to have kept the said road in repair," otherwise judgment will be arrested. *State v. Patton*, 4 Ired., 16.

118. The omission of "North Carolina," in an indictment found in a court of this state, where the name of the county is inserted

in the margin or body of the indictment, is not a cause for arresting the judgment. *State v. Lane*, 4 Ired., 113.

119. Where an indictment sets forth the time of commission of murder in these words, "on the third day of August, eighteen hundred and forty-three," without saying "the year of our Lord," or even using the word "year," *it was held* that, although this defect would have been fatal at common law, it was cured by the act of 1811. *Ibid.* (See Rev. Code, ch. 35, sec. 14.)

120. By the act of 1842, ch. 10, a part of the county of Burke, and a part of the county of Rutherford, were constituted a new county by the name of McDowell; and, by a supplemental act, jurisdiction of all criminal offences, committed in that part of McDowell taken from Burke, was given to the superior court of Burke. But an offence committed in McDowell county ought not to be *alleged* to have been committed in Burke; for although the *jurisdiction* of the offence was given to the superior court of Burke, its locality must be truly averred. *State v. Fish*, 4 Ired., 219.

121. Where an indictment for a rape charged that the defendant "with force and arms, &c., in and upon one Mary Ann Taylor, &c., violently and feloniously did make an assault, and her, the said Mary Ann Taylor, then and there violently, and against her will feloniously, did ravish and carnally know," is sufficient as the court must see with certainty that Mary Ann Taylor was a female. *State v. Farmer*, 4 Ired., 224.

122. It is not necessary, in an indictment for a rape, to state that the female ravished was of the age of ten years. But if she be *under* the age of ten years, then that fact should be averred, because abusing such a female is made felony by the statute, whether she assented to the act or not. *Ibid.*

123. Where an indictment charges both a selling *by* a slave, and a selling *to* a slave, in the same count, advantage cannot be taken of this, though not strictly proper, by motion in arrest of judgment; for, after trial at least, such a defect in form is cured by the statute of amendment. *State v. Hart*, 4 Ired., 246. (See Rev. Code, ch. 35, sec. 14.)

124. In the 2d section of the act of 1819, making it indictable to pass a counterfeit bank note, "purporting to be a bill or note issued by order of the president and directors," &c., the legislature did not use the word "purporting" in its strict technical sense, as meaning that these words should appear on the face of the counterfeit bill or note, but in its popular signification to denote a bill or note, presumed to have been issued by order of the president and directors of a bank. An indictment, therefore, which sets out the purport of the counterfeit note, as it really appears on its face, is sufficient. *State v. Harris*, 5 Ired., 287. (See Rev. Code, ch. 34, sec. 61.)

125. An indictment against a free person of color, which

charges that he did "buy of, traffic with and receive from a certain negro slave, &c., one peck of corn," &c., is good, although the act, forbidding the dealing of free persons of color and slaves, only uses the words, "if he shall trade with any slave, either by buying of or selling to him," &c. The other words used in the indictment are mere surplusage. *State v. Cozens*, 6 Ired., 82.

126. The words *vi et armis*, in an indictment for murder, are now superfluous, and more especially in an indictment against an accessory, as his offence tends only to a breach of the peace, and is not, of itself, an actual breach of it. *State v. Duncan*, 6 Ired., 236.

127. An indictment for a libel must set forth matter on its face libellous, in which case the court is to judge whether it be so or not; or it must aver that the matter charged, though not on its face libellous, was intended in fact to be so, and then the question is to be submitted to a jury. *State v. White*, 6 Ired., 418.

128. The purpose of setting forth the name of the person, on whom an offence has been committed, is to identify the particular fact or transaction, on which the indictment is founded, so that the accused may have the benefit of an acquittal or conviction, if accused a second time. The name is generally required as the best mode of describing the person; but he may be described otherwise, as by his calling, or the like, if he be identified thereby as the individual, and distinguished from all others, and if the name be not known, that fact may be stated as an excuse for omitting it altogether. *State v. Angel*, 7 Ired., 27.

129. An indictment, which charges that A, B and C, with force and arms, &c., unlawfully, riotously and routously, did assemble together to disturb the peace of the State, and did then and there, being so assembled and gathered together, make a great noise and disturbance in and near the dwelling house of one W. S., proclaiming that the said W. S. and his wife were persons of color, offering them for sale at auction, and calling them vulgar and opprobrious names, all of which was done in a loud voice, so that the same could be heard at a great distance, to the great damage and terror of the said W. S. and his wife, and to the common nuisance," &c., does not charge any criminal offence, inasmuch as it does not state that the said W. S., or his wife, was in the house at the time. *State v. Hathcock*, 7 Ired., 52.

130. Every indictment is a compound of law and fact, and must be so drawn, that the court can, upon its inspection, be able to perceive the alleged crime. *Ibid.*

131. An indictment, which charges that the defendant did keep a disorderly house, and "certain persons, as well free as slaves, to frequent and come together, then, and on the said other days and times, there unlawfully and wilfully did cause and procure, &c., to be and remain, drinking, tippling and misbehaving themselves," &c., is sufficient to charge a criminal

offence, without setting forth the particulars, as the names of the parties, &c., though these particulars may be given in evidence on the trial. *State v. Patterson*, 7 Ired., 70.

132. An indictment for a highway robbery may charge either that the robbery was committed *in* the highway, or that it was committed *near* the highway. *State v. Anthony*, 7 Ired., 234.

133. But if the indictment charge that the robbery was *in* the highway, the State cannot give in evidence that it was *near* the highway. *State v. Cowan*, 7 Ired., 239. (See Rev. Code, ch. 34, sec. 2.)

134. An indictment for a highway robbery, which charges that the property was taken from the person, and against the will, of the owner, feloniously and violently, is sufficient. *Ibid.*

135. A wharf, simply as such and not being part of a street, is not a public highway, upon which a highway robbery can be committed. *Ibid.*

136. In an indictment for altering the mark of a cattle beast, it is not necessary to set forth the original mark, nor in what manner the alteration was made. *State v. O'Neal*, 7 Ired., 257.

137. An indictment for trading with a slave in the day time, by selling him spirituous liquors, must negative an *order* of the owner or manager, as well as a delivery for the owner. But an indictment for such selling in the night time need not contain such negation, because the offence is complete, whether the slave had a written permission from his owner or not. *State v. Miller*, 7 Ired., 275.

138. An indictment for murder, which charges the homicide to have been committed on the "twelfth" day of August, instead of the "twelfth" day of that month, is good; if not at common law, at least under the statute, Rev. Stat., ch. 35, sec. 12. *State v. Shepherd*, 8 Ired., 195. (See Rev. Code, ch. 35, sec. 14.)

139. In an indictment for murder, if the time stated be anterior to the indictment, it is material and only material in one respect, and that is, that the day of the death, as laid, is within a year and a day of the wounding; and if that appear from the stating of the month, the *day* of the month is immaterial; according at least to the construction of the act curing defects in indictments. *Ibid.*

140. An indictment, which charges that "A. B., late, &c., at &c., with force and arms, &c., did publicly curse and swear, and take the name of Almighty God in vain, for a long time, to wit: for the space of two hours, to the common nuisance of all the citizens of the State," &c., cannot be supported. For, to render the offence of profane swearing indictable, the acts must be so repeated and so public, as to become an annoyance and inconvenience to the public for then they constitute a public nuisance. *State v. Jones*, 9 Ired., 38.

141. It is not sufficient to the conviction of a defendant, on such an indictment as the above, that the State should show that the defendant had committed a nuisance, unless it be properly charged as such; nor will it be sufficient to charge that the facts were done "to the common nuisance of all the good citizens of the State," unless the facts so charged amount in law to a nuisance. *Ibid.*

142. In an indictment for selling to a slave in the night time, it is not necessary to negative an order of the owner or manager, as the offence was committed, and so alleged to be, in the night time. *State v. Robbins*, 9 Ired., 356.

143. In such an indictment, the slave is sufficiently identified by his name; and a further description by giving the name of his owner is unnecessary. *Ibid.*

144. Although it is not proper, in an indictment, to lay an offence as committed against "the act of assembly," instead of saying against "the statute," yet the informality is cured by our act. *State v. Tribatt*, 10 Ired., 151.

145. Where, in an indictment for cheating by a false token in relation to the conveyance of land, the charge intended to be made is, that the defendant intended to cheat the plaintiff out of twenty acres of land, the excess in quantity over thirty-five acres, the indictment should expressly aver that there was, in fact, such an excess of twenty acres. *State v. Burrows*, 11 Ired., 477.

146. In an indictment for bigamy, the place where the first marriage was had is not material; and it is sufficient to set forth that there was a prior marriage. *State v. Bray*, 13 Ired., 289.

147. An indictment, for receiving stolen goods, must aver from whom the goods were received, so as to show that he received them from the principal felon; for if he received them from any other person, the statute will not apply. *State v. Ives*, 13 Ired., 338. (See Rev. Code, ch. 34, sec. 56.)

148. Where a genuine instrument is altered, so as to give it a different effect, the forgery may be specially alleged, as constituted by the alterations, or the forgery of the entire instrument may be charged. *State v. Weaver*, 13 Ired., 491.

149. An indictment for the forgery of an instrument, professing to set it out according to its tenor, should give the names, in describing the instrument, spelt as they appear spelt in the original. *Ibid.*

150. The wearing, or carrying about the person, or keeping in his house, by a free negro, of *any one* of the articles prohibited by the act of 1840, ch. 40, as a rifle, musket, bowie knife, &c., is a distinct offence, and should be so charged in the bill of indictment. But where the indictment charged, in the same count, the carrying of a "musket, rifle and shot gun," proof of the carrying of *either one* of the articles is sufficient to justify a con-

viction; and the objection to the indictment cannot be taken advantage of, either at the trial, or upon a motion in arrest of judgment. *State v. Locklear*, Busb. 205. (See Rev. Code, ch. 107, sec. 66.)

151. An indictment charging a railroad company, as the owner of a public ferry, for not keeping up the same, must set forth how the duty of keeping up the ferry and transporting passengers became imposed by the charter of the company. *State v. Wilmington and Manchester Railroad Company*, Busb. 234.

152. Where a statute defines an offence, makes it indictable and prescribes the punishment, an indictment for it is wholly founded on this statute, although it contains a reference to a former statute, giving a penalty to a common informer for the same act. Therefore, if the indictment concludes against the form of the "statutes," it is fatally defective. *State v. Abernathy*, Busb., 428. (Such a defect is not now fatal, see Rev. Code, ch. 35, sec. 20.)

153. In an indictment against a justice, for corruption in an act done in virtue of his office, it is not sufficient to charge that the act was done corruptly; the facts must be set out in which the corruption consists. *State v. Zachary*, Busb., 432.

154. An indictment for an affray, which simply charges that the defendants "did make an affray," without stating in what manner, or by what acts, is defective. *State v. Woody*, 2 Jones, 335.

155. In a charge against a person of color, for an assault with an intent to commit a rape, it is not necessary to allege in the indictment that the accused was a *male*, nor that the white female assaulted was a female of the human species. *State v. Tom*, 2 Jones, 414.

156. An indictment, charging that an assault was made with an "intention" to ravish, &c., instead of "intent," is good, at least under the act of 1811. *Ibid.* (See Rev. Code, ch. 35, sec. 14.)

157. Where, in an indictment for murder, the word "blow" was used instead of "wound," but there were words in the context showing that a wound was given, and what kind of a wound it was; *it was held* (NASH, C. J. dissenting,) that it was an informality in the indictment, which was cured by the act of 1811. *State v. Noblett*, 2 Jones, 418.

158. An indictment against the commissioners of a town, for failing to perform their duty in keeping the streets of the town in repair, for a certain space of time, must aver the tenure and duration of their office, so as to show that they were commissioners when the neglect to perform their duty occurred. *State v. Commissioners of Raleigh*, 3 Jones, 399.

159. Where the commissioners of a town are authorized to raise money by taxation, for repairing the streets, and to expend

it in a particular way, viz: by letting out the work to the lowest undertaker, it is not sufficient to charge generally, that they refused and neglected to raise and expend the money in repairing the streets. *Ibid.*

160. In an indictment for cheating by means of a false token, to wit, "a counterfeit quarter of a dollar," it is not material to aver of what currency the counterfeit quarter of a dollar was; nor to aver that the counterfeit was made like the one alleged to be imitated, the word "counterfeit" being a sufficient allegation of that fact. *State v. Boon*, 4 Jones, 463.

161. In such an indictment, it is not necessary to aver that the counterfeit money was *passed*; nor the *value* of the thing obtained by means of the false token, if such thing be recognized as *property*; nor that the thing obtained was the property of the person from whom it was alleged to have been obtained; for if the omission of the latter would be fatal at common law, it is cured by statute, Rev. Code, ch. 35, sec. 14. *Ibid.*

162. Under the Revised Code, ch. 34, sec. 88, in an indictment or warrant for the penalty, it is sufficient to aver a sale of spirituous liquor to a slave, without the permission in writing of the person having the management of such slave, without adding that it was not for the owner or manager. *Pope v. Luther*, 6 Jones, 413.

163. In an indictment for murder, where the facts are so, it may be charged it was done "in some way and manner, and by some means, instruments and weapons to the jurors unknown." *State v. Williams*, 7 Jones, 446.

164. An indictment, upon the 29th section of the 107th chapter of the Rev. Code, is sufficient, if it aver that the defendant did "permit the said slave Peggy to keep house to herself as a free person," and, in the second count, "did connive at said negro slave keeping house to herself as a free person." *State v. Duckworth*, 1 Winst., 243.

See (Act of assembly, 8.) (Justices of the Peace—Of the responsibility of justices, 2.) (Malicious mischief, 3-6.) (Mills—Indictments against mill owners for keeping false toll dishes, 2-3.) (Perjury, 3-5-7-8-9-10-14-15-17-18-19-20-21-22-23.)

III. OF THE TRIAL, VERDICT AND JUDGMENT.

1. On an indictment for burglary and felonious stealing, &c., the jury may find the prisoner guilty of the larceny, though not guilty of the burglary. *State v. Grisham*, 1 Hay., 12, (17.)

2. An indictment contained three counts, of the first of which the court had no jurisdiction; and the defendant was, therefore, not permitted by the court to submit on that only, as his consent could not give it jurisdiction. The submission must be upon all the counts, unless the solicitor for the State enter a

nol. pros. as to those upon which there is no submission. *State v. Roberts*, 1 Hay., 176, (201.)

3. Upon assaults with intent to kill, the courts are not bound to imprison upon a submission or conviction. They may, at their discretion, inflict a fine only. *Ibid.*

4. The proper process to compel payment of a fine is a *capiatur pro fine*, which is issued when the party is not in court at the time when the fine is laid; but when he is in court, and is ordered into custody, it is improper to discharge him and order a *fi. fa.* to issue. *State v. Johnson*, 1 Hay., 293, (338.)

5. After conviction, on an indictment against a sheriff for a false return, the court will not permit the State to show that he has made false returns on many other writs, to aggravate the fine. *Ibid.*

6. In an indictment for a riot, if one of several be convicted, the others not having been taken, he may be punished, because, though the others be afterwards acquitted, he is estopped by the verdict to deny his guilt. *State v. Pugh*, 2 Hay., 55, (218.)

7. The act of 1791, relative to the killing of slaves, is not certain enough to warrant the court in passing sentence of death, upon a prisoner convicted under it. *State v. Boon*, Tay., 246, (103.) (The act has been amended. See Rev. Code, ch. 34, sec. 9.)

8. In an indictment for mayhem, if no issue be joined between the State and the defendant, the judgment will be arrested. *State v. Fort*, 1 Car. L. R., 510, (122.)

9. Where an indictment contained two counts, one for aiding and abetting in a mayhem, and another for assault and battery, and the defendant was acquitted upon the first, but convicted upon the second, *held* that no judgment could be rendered. *State v. Bridges*, 1 Murph., 134.

10. Females are entitled to benefit of clergy. *State v. Gray*, 1 Murph., 147. (Benefit of clergy is now abolished. See Rev. Code, ch. 34, sec. 22.)

11. Judgment shall not be arrested because the *venire*, returned to the superior court, consisted of forty, instead of thirty-six, jurors; nor because one of the jurors was on the coroner's inquest; nor because it does not appear, on the face of the proceedings, that the bill was found upon oath, nor that any of the witnesses were sworn and sent to the grand jury. *State v. McEntire*, 2 Car. L. R., 287, (267.)

12. Where, in an indictment for extortion, the jury found that the defendant took more than his legal fees, but did not take them corruptly, the verdict is in effect one of acquittal. *State v. Bright*, 2 Car. L. R., 634, (437.)

13. If an indictment for forgery contain a charge of the crime at common law, judgment may be given on it, though the pris-

oner was indicted under the statute. *State v. Walker*, N. C. Term R., 229, (661.)

14. It is the province of the judge, in a case of homicide, to explain the law to the jury, leaving to them the exclusive decision as to the truth or falsehood of the facts given in evidence. Hence, it is not improper for him to charge the jury, that "the prisoner was guilty of murder, or guilty of no offence at all—that it was not a manslaughter case," if the facts deposed to, if believed, establish a case of murder. *State v. Walker*, N. C. Term R., 230, (662.)

15. When, from the finding of the jury, the party may be innocent, he will not be presumed guilty. Hence, if a man be indicted for perjury, in swearing that he did not *execute* a certain deed, and the jury find specially that he is guilty of perjury in *denying his signature*, the judgment must be arrested; for a deed may be executed without actual signing. *State v. Avera*, N. C. Term R., 237, (669.)

16. Where, upon an indictment for felony and horse stealing, the jury returned for their verdict, "that the prisoner was not guilty of the felony and horse stealing, but guilty of a trespass," and the court desired them to reconsider their verdict, and say "guilty or not guilty, and no more," and the jury, thereupon, retired and returned a verdict of "guilty" generally, the supreme court decided that the first finding of the jury should be ordered to be recorded, and the prisoner discharged; the prisoner being entitled to such an order whenever he is, either in terms or in effect, acquitted by the jury. *State v. Arrington*, 3 Murph., 571.

17. When a jury returns an insensible or informal verdict, or one that is not responsive to the issues submitted, they may be directed by the court to reconsider it, but in no other case. *Ibid.*

18. Under the act of 1816, corporal punishment and fine cannot both be imposed on a person convicted of felony within clergy. And, under the same act, whipping must be restricted to infamous crimes, and the true construction is to refer the fine to manslaughter, and whipping to larceny, and the like. *State v. Kearney*, 1 Hawks., 53. (The benefit of clergy is now abolished, and manslaughter is punished by branding or a fine, with imprisonment, not exceeding twelve months, superadded to either. See Rev. Code, ch. 34, secs. 22 and 24.)

19. A caption forms no part of the indictment, and therefore it is no ground for arresting the judgment, that the indictment does not show in its caption that it was taken in some court in North Carolina. *State v. Brickell*, 1 Hawks., 354.

20. In capital cases, there is no need of a formal joining of issue preparatory to trial; the prisoner's plea, and the *sin i iter*, being *ore tenus*. *State v. Lamon*, 3 Hawks., 175.

21. When a prisoner in a capital case has once pleaded "not

guilty," he cannot, as a matter of right, withdraw it, and plead in abatement, though the court may, in its discretion, permit him to do so. *Ibid.*

22. After a conviction for murder, it is not a ground for arrest of judgment, that one of the grand jury, which found the bill, was one of the coroner's inquest. *Ibid.*

23. It is no ground for an arrest of the judgment, that the record states merely that the "grand jury was duly drawn, sworn and charged," without saying that they were drawn from the original panel, for it is not necessary that the record should set forth the *formula* by which the grand jury is constituted. *Ibid.*

24. When a *nol. pros.* is entered to an indictment in the county court, the defendant therein becomes amenable on another indictment, in any court having jurisdiction of the offence; other wise, a *nol. pros.* would amount to an acquittal. *State v. McNeil*, 3 Hawks, 183.

25. The attorney general has a discretionary power to enter a *nolle prosequi*, for the proper exercise of which he is responsible to the public; and the court will not interfere, unless the power be oppressively used. After entering a *nol. pros.* at the trial, he may issue a *capias* upon the same indictment, returnable to the next term of the court. *State v. Thompson*, 3 Hawks, 613.

26. Corporal punishment and imprisonment cannot both be inflicted on a person found guilty of manslaughter. *State v. Yeates*, 4 Hawks, 187. (For the punishment of manslaughter for the first offence, see Rev. Code, ch. 34, sec. 24.)

27. If an indictment for an affray charge the parties with "mutually assaulting and fighting with each other," they may be acquitted of the affray, and one only of them be found guilty of an assault and battery upon the other. *State v. Allen*, 4 Hawks, 356.

28. When, on the removal of a cause, the transcript does not state either the appointment of a foreman of the grand jury, or a motion for the removal, they may be inferred from other entries on the record. *State v. Weir*, 1 Dev. 363.

29. A jury, when charged with the trial of a capital offence, cannot be discharged without returning a verdict, unless for some cause which human sagacity can neither foresee nor prevent; therefore, where a jury were charged with the trial of a prisoner for murder, and, before they returned their verdict, the term of the court expired, and the jury separated, it was held that the prisoner could not be tried again. *State v. Spier*, 1 Dev., 491. (The term is now continued until such a trial is ended, see Rev. Code, ch. 31, sec. 16.)

30. The provision of the constitution, "that no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb," not only forbids a second trial for the same offence after

an acquittal, but also where the jury have been once charged upon a perfect indictment, and were not prevented from returning a verdict by the act of God, or at the request of the prisoner. *Ibid.*

31. Upon a conviction of murder, the proper and formal entry of the verdict is, "guilty of the felony and murder in manner and form as he stands charged," &c; but where the jury thus responded, and the entry was "guilty in maner and form as charged," the finding was held sufficient, and the prisoner not entitled to his clergy. *State v. Upton*, 1 Dev., 513.

32. Upon the principle that belief is more readily yielded to a probable, than to an improbable proposition, less strong and irrefragable proof will justify a conviction for a misdemeanor, than for a felony; but in both cases there should not be a reasonable doubt of the guilt of the accused. *State v. Cockran*, 2 Dev., 63.

33. The manner, in which inferior courts exercise their jurisdiction, must appear upon the record of their proceedings, and no intendment is made to support their acts; but superior courts are supposed to do every thing in the prescribed manner and form. Therefore, where it appeared on the record of the superior court, that a grand jury was empannelled, but it was not stated that they were sworn, it was held to be sufficient. *State v. Kimbrough*, 2 Dev., 431.

34. On the trial of a capital case, it is a matter of discretion with the court to adjourn in the evening over to the next morning, keeping the jury together, and this without the prisoner's consent. *Ibid.*

35. In the record of an indictment, it is proper to state it as taken "at a superior court of law," and not "at a superior court of law and equity." *Ibid.*

36. In a record, which states that "at a superior court begun and held, &c., present the Hon. A B, judge," it will be intended, that the judge was present in his official character. *Ibid.*

37. In courts of supreme original criminal jurisdiction, every thing, as to the method of proceeding, is presumed and taken to be right, unless the contrary appears. *State v. Seaborn*, 4 Dev., 305.

38. Upon a conviction for arson, the convict is ousted of his clergy. *Ibid.*

39. Upon an indictment under the act of 1825, "for carrying, conveying and concealing a slave on board a vessel, with the intent, and for the purpose of conveying the slave beyond the limits of the State, and enabling him to effect his escape out of the State," a verdict finding the prisoner guilty of the felony of carrying, conveying and concealing, as charged in the bill of indictment, is defective and a *venire de novo* must be awarded. *State v. Edmund*, 4 Dev. 340. (See Rev. Code, ch. 34, sec. 11.)

40. A freeman of color is a citizen of the State, and a slave a *person* within the meaning of the act of 1825. *Ibid.*

41. Misconduct of a juror, in a capital case, as a separation from his fellows, or drinking without the permission of the court, before delivering the verdict, was held to be a reason for applying to the discretion of the judge, in the court below, for a new trial, but not to render the verdict a nullity, and a *venire de novo* proper. *State v. Miller*, 1 Dev. and Bat., 500.

42. Matter alleged as a ground for a *venire de novo* should be stated on the record, and not brought forward in *pais*, as matter for a new trial. *Ibid.*

43. It is no cause for vacating the verdict, or arresting the judgment, in a capital case, for one of the jurors in rendering the verdict, to declare that, being forced by the laws of his country, he was bound to say that the defendant was guilty. *State v. Swinke*, 2 Dev. and Bat. 9.

44. A jury charged in a capital case, cannot be discharged at the discretion of the court, before returning a verdict; they cannot be discharged without the prisoner's consent, but for evident, urgent, overruling necessity, arising from some matter occurring during the trial, which was beyond human foresight and control; and, generally speaking, such necessity must be set forth in the record. *State v. Ephraim*, 2 Dev. and Bat. 162.

45. Forgery being a misdemeanor only, the defendant is not entitled to thirty-five peremptory challenges, under the act of 1777, unless the offence is charged to be a second one. *State v. Morgan*, 2 Dev. and Bat. 348. (See Rev. Code, ch. 35, sec 32, by which the number of peremptory challenges in a capital trial is reduced to twenty-three.)

46. Where there are several counts in an indictment, the State may be ruled to elect upon which the trial shall be had; but this is done only to prevent injury to the accused, where the counts contain charges of distinct offences, but never where they are only variations in the mode of charging the same offence. *State v. Haney*, 2 Dev. and Bat., 390.

47. The act of 1831, authorizing the hiring out of a free person of color, convicted of a criminal offence, for the payment of the fine imposed, where he is unable to pay the same, does not extend to one who submits to the court. *State v. Oxendine*, 2 Dev. and Bat., 435. (See Rev. Code, ch. 107, sec. 75.)

48. It is competent for the court, after a motion in arrest of judgment, to alter the record during the same term, by inserting in, or striking from, the minutes, whatever may be necessary to make them, when enrolled, speak the truth; and if, by such alteration, the grounds for a motion in arrest be removed, upon an appeal nothing can be looked to but the record in its complete state. *State v. Roberts*, 2 Dev. and Bat., 540.

49. A motion in arrest of judgment cannot be sustained, on

the ground that it does not appear from the endorsement on the bill of indictment, that the witnesses were sworn before they were sent to the grand jury; for the judgment can be arrested only for matter appearing, or for the omission of some matter which ought to appear, on the record, and those endorsements form no part of the bill. *Ibid.*

50. A person convicted of manslaughter may be burned in the hand, and also imprisoned for any time not exceeding one year. The statutes of 4 Hen. 7, ch. 13 and 18 Eliz., ch. 7, not being altered in this respect by the act of 1816. *State v. Henderson*, 2 Dev. and Bat., 543. (See Rev. Code, ch. 34, secs. 24 and 25.)

51. Where the record set forth an indictment for murder, the answer of the prisoner to the enquiry how he would acquit himself, the reply of the attorney general, the order for a jury to come, and then proceeded "and afterwards in the said case, *State v. T. H. C.*, indictment, murder, the following jury being sworn and empaneled, to wit, &c., who say that the prisoner, *T. H. C.*, is guilty of the felony and murder in manner and form as charged in the bill of indictment," *it was held* that the record showed, if not in express terms, yet by necessary implication and requisite certainty, that the jury was sworn to try the truth of the matters charged in the indictment. *State v. Christmas*, 4 Dev. and Bat., 410.

52. In capital cases, though it is usual to make up an issue with the prisoner on his plea of not guilty, yet it is not necessary to do so. The issue is immaterial, for the trial is in the nature of an inquisition, in which the jury is charged to enquire of the truth of the accusation contained in the indictment. *Ibid.*

53. It would probably not be error, if the record were to set forth the verdict as a finding on the issue joined between the State and the prisoner, where the issue is joined on the truth of the indictment, but such is not the regular form of stating it. *Ibid.*

54. It is enough that the record, in an indictment for murder, be certain *to a certain intent in general*. It is not necessary that it should be certain *to a certain intent in every particular*, so as absolutely to exclude every possible conclusion, all arguments, presumption or inference against it. *Ibid.*

55. The officer prosecuting for the State has a discretionary power to enter a *not. pros.*, for the proper exercise of which he is responsible, though the court would certainly interfere, if he attempted to exercise this power oppressively. *State v. Buchanan*, 1 Ired., 59.

56. When a defendant is acquitted upon one count in an indictment, and convicted on another, if, upon an appeal, a *venire de novo* be ordered, it must be to retry the whole case. *State v. Stanton*, 1 Ired., 424.

57. Where an indictment charges a rescue, and also an assault

and battery, and the defendant is convicted generally, if the averments, as to the rescue, are uncertain and bad, these may be rejected as uncertain and immaterial, and the court may proceed to pass judgment upon the verdict, as for an assault and battery. *State v. Morrison*, 2 Ired., 9.

58. Where the record uses the past tense, as that in the award of a *venire facias* the sheriff *was* commanded, or the indictment *was* found, &c., this, though not strictly regular, has been for so long a time the practice in this state, that the court will not pronounce it a fatal error. *State v. Martin*, 2 Ired., 101.

59. It is no ground for arresting the judgment after a conviction on an indictment, that it appears from the record that the grand jury, who found the bill, consisted of only fifteen jurors. *State v. Davis*, 2 Ired., 153.

60. By the common law, a grand jury may consist of any number between twelve and twenty-three. Our statute upon the subject of a grand jury is only directory to the court, and does not make void a bill or presentment found, by a grand jury consisting of the common law number. *Ibid.*

61. The time, at which a sentence in a criminal case shall be carried into execution, forms no part of the judgment of the court. Therefore, where a defendant, who had been convicted of an assault, was sentenced to be imprisoned for two calendar months, "from and after the first day of November next," and did not go into prison according to the sentence, and, at a subsequent court, it was directed that the sentence for two months' imprisonment should be immediately executed, *it was held* that the court had power to make such order. *State v. Cockerham*, 2 Ired., 204.

62. When, upon a conviction for a clergeable offence, the defendant prays the benefit of clergy, and the officer for the State objects upon the ground that the prisoner has before had it allowed him, he must present the objection in the form of a counter plea in writing. *State v. Carroll*, 2 Ired., 257. (The benefit of clergy is now abolished, and the case of what were formerly clergeable felonies otherwise provided for. See Rev. Code, ch. 34, sec. 22 and following.)

63. Defendants in an indictment have a right to plead severally, not guilty, and a general plea of not guilty by all the defendants is, in law, a several plea. But whether the *trial* shall be separate or not, is a matter of sound discretion, to be exercised by the court under all the circumstances of the case. *State v. Smith*, 2 Ired., 402.

64. Where the jury, in a special verdict, do not say that they find in one way or the other, according as the opinion of the court may be upon the law, the verdict is imperfect. And where a special verdict is imperfect or bad, so that no judgment can be

given thereon, the proper course is to order a *venire de novo*. *State v. Wallace*, 3 Ired., 195.

65. To a tender of an issue to the country, by a prisoner, in the plea of "not guilty," in a capital case, the attorney general always replies *ore tenus*, and the record need not show it. *State v. Carroll*, 5 Ired., 139.

66. Where a prisoner prays the benefit of his clergy, a counter plea may be filed in the name of the prosecutor, "for and in behalf of the State," if the same be adopted by the attorney general, though it should properly be in his, the attorney general's, name. *Ibid.*

67. If the prisoner contends that the offence, for which he now prays his clergy, was committed before his allowance of clergy for a former offence, he must avail himself of that defence by a plea of pardon, when brought up for judgment, or by a special replication to the counter plea. *Ibid.* (Benefit of clergy now abolished, and also the species of pardon here referred to. See Rev. Code, ch. 34, sec. 22 and 23.)

68. Where, in a capital case, one of the jury, on their coming into court and being polled, said "that when he first went out he was not for finding the prisoner guilty, but that a majority of the jury was against him, and that he then agreed to the verdict of guilty as delivered in by the foreman," and, being again asked, "What is your verdict now?" he replied, "I find the prisoner guilty," *it was held* that there was no objection to the verdict. *State v. Godwin*, 5 Ired., 401.

69. Although it is more correct, in making up the record of a criminal trial, that the presence of the prisoner should be expressly affirmed, yet it is sufficient if it appear by a necessary or reasonable implication; as where it is stated that the prisoner, who had been before committed to the custody of the sheriff, was ordered to be brought to the *bar*, and immediately thereafter he is called by the jury in giving, and by the clerk in recording, the verdict, the prisoner at the *bar*, and next the court, in passing sentence, adjudged that the prisoner be *taken back* to the prison. *State v. Craton*, 6 Ired., 164.

70. After a free person of color has been convicted on an indictment, under the act, for marrying a slave before the act of 1845, it is too late for him to apply to the court to discharge him, on the ground that the master of the slave had given his consent to the marriage. The defence should have been made on the trial. *State v. Roland*, 6 Ired., 241. (See Rev. Code, ch. 107, sec. 61.)

71. Where the jury find a general verdict of "guilty," the court must either pronounce its sentence upon the verdict or grant a new trial. It cannot set aside the verdict, and direct a judgment of acquittal to be entered for the defendant. *State v. Curtis*, 6 Ired., 247.

72. Where the jury find a verdict subject to the opinion of the court on a point reserved, the court cannot grant a judgment against the verdict, unless the jury say "they find such and such facts, and if, upon them, the court thinks the law is with the defendant, they find him not guilty, if otherwise, guilty," or words in substance to that effect. *Ibid.*

73. Where, on the trial of an indictment, the jury find a verdict of "guilty" generally, and that appears on the record, the supreme court cannot consider it as a special verdict, subject to the opinion of the court, notwithstanding the statement of the case by the judge so reports it. *State v. Cox*, 6 Ired., 440.

74. Where, on the trial of an indictment for murder, the prisoner's counsel objected, that the name of the deceased as mentioned in the indictment was not his true name, that was a fact to be tried by the jury. *State v. Angel*, 7 Ired., 27.

75. A special verdict is, in itself, a verdict of guilty or not guilty, as the facts found in it do or do not constitute in law the offence charged. There is nothing to do but to enter a judgment thereon, for or against the accused, unless the court should deem the verdict as found not to be sustained by the evidence, when they may set it aside and order a *venire de novo*. *State v. Moore*, 7 Ired., 228.

76. A judgment on a special verdict leaves the matter of law distinctly open to review in a higher court. *Ibid.*

77. When the court, in which a special verdict is found, sets it aside, as it may do, it cannot of itself enter a general verdict of guilty or not guilty; that can only be done by a new jury; and if it be done by the court, it is a mis-trial. *Ibid.*

78. A prisoner may be convicted upon his own voluntary and unbiassed confession, without any other evidence. *State v. Cowan*, 7 Ired., 239.

79. Upon a conviction on an indictment containing several counts, one of which is good and the others bad, judgment must be rendered for the State upon the good count. *State v. Miller*, 7 Ired., 275.

80. Where the record of the proceedings, on an indictment for murder, uses the past tense instead of the present, it is not error for which the judgment can be arrested. *State v. Reeves*, 8 Ired., 19.

81. Where a prisoner, indicted for murder, upon his arraignment pleads not guilty, "and for his trial puts himself on his country," it is sufficient, without saying "on God and his country." *Ibid.*

82. It is not error, when a jury is polled, and each juror agrees to the same verdict of guilty, to enter it as the verdict of the whole jury. *State v. John*, 8 Ired., 330.

83. It is not necessary that the record should show a *venire*

facias, either original or special, to the term of a court at which a prisoner is tried. *State v. Barfield*, 8 Ired., 344.

84. Where the jury, on a trial for homicide, state "that the prisoner at the bar" is guilty, and the clerk in recording the verdict calls him "the prisoner at the bar," that shows, from the record, that the prisoner was actually in court when the verdict was rendered. *State v. Collins*, 8 Ired., 407.

85. Where there are different counts in an indictment under the statute, for stealing a slave, one charging a taking by the prisoner with violence, and another by seduction, and each of them also charging a conveying away with the intents required by the statute, the jury are not bound to find in which way the taking was done, but the verdict may be general, though there be other defective counts. *State v. Williams*, 9 Ired., 140.

86. It is in the discretion of the attorney general, on the trial of a capital case, to introduce on behalf of the State only such witnesses as he may think proper. *State v. Stewart*, 9 Ired., 342.

87. If, on the trial of a slave for a capital offence, the counsel for the prisoner does not ask the court to give to a mulatto witness, introduced on the part of the State, the charge required by the act, Rev. Stat., ch. 111, sec. 51, no advantage can be afterwards taken of the omission of the judge to make such charge. *Ibid.* (See Rev. Code, ch. 107, sec. 72.)

88. Whether such a charge was or was not given, cannot appear upon the record, unless placed there by the exceptions of one or the other of the parties. *Ibid.*

89. Where several persons are indicted together for a trespass, it is not a matter of right for any of the defendants to insist, on the trial, that the jury should be required to pass upon the guilt or innocence of any of the others, before they pass upon the whole. This is a matter of discretion with the presiding judge, to be exercised very cautiously, and from the exercise of which there is no right of appeal. *State v. Bogue*, 9 Ired., 360.

90. Where there are two counts in an indictment, of which one is good and the other bad, and there is a general verdict against the defendants, the judgment will be presumed to have been given upon the good count alone. But where both counts are good, and the court gives erroneous instructions to the jury as to one of the counts, it is presumed that judgment was given upon both counts, and a *venire de novo* will be awarded. *State v. McCanness*, 9 Ired., 375.

91. In this State, where one is indicted and tried as for a felony, yet the facts averred in the indictment do not support the charge of felony, but amount to a misdemeanor, the court may give judgment for such misdemeanor. *State v. Upchurch*, 9 Ired., 454.

92. Where a defendant was convicted on an indictment for a

felony, and appealed from the judgment thereon to the supreme court, and the error assigned in that court was, that the facts stated in the indictment did not amount to a felony, the supreme court, though it reverse the judgment for this error, yet will, (under the provisions of the act establishing the court,) give directions to the court below to give judgment for a misdemeanor, where it appears that such is the judgment which the court below should have rendered. *Ibid.*

93. Upon the trial of an indictment for an affray, after the jury had returned into court, and intimated an intention to acquit one of the defendants, but had not announced their verdict, the court told them that, if they believed the evidence, both of the defendants were guilty; whereupon, the State's solicitor directed the clerk to enter a verdict of guilty as to both, which was done, and the jury being asked if that was their verdict, made no direct assent but by a nod from each of them, *it was held* that this proceeding was so irregular and contrary to the established mode, that the judgment should be set aside, and a *venire de novo* awarded. *State v. Shule*, 10 Ired., 153.

94. A special verdict, which finds only the evidence from which facts may be inferred, is defective. It must find the facts themselves. *State v. Watts*, 10 Ired., 269.

95. There is a distinction between a cause for a *new trial*, and a cause for *mistrial*; the former is a matter of discretion, the latter a matter of law. *State v. Tilghman*, 11 Ired., 513.

96. Where, on a trial, the circumstances are such as merely to put suspicion on the verdict, by showing not that there *was*, but that there *might have been*, undue influence brought to bear on the jury, because there was opportunity and a chance for it; it is a matter within the discretion of the presiding judge. But *if the fact be*, that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor or prisoner; or if they be solicited and advised how their verdict should be; or if they hear other evidence than that which is offered on the trial; in all such cases, there has been in contemplation of law *no trial*, and the supreme court, as a matter of law, will direct a trial to be had, whether the former proceeding purports to have acquitted or convicted the prisoner. *Ibid.*

97. In indictments for misdemeanors, the court may, without the consent of the defendant, withdraw a juror, when, in its discretion, it judges it necessary to the ends of justice. *State v. Weaver*, 13 Ired., 203.

98. It is not the duty of the officer prosecuting for the State to examine, on a criminal trial, all the witnesses who were present at the perpetration of the act. *State v. Perry*, Busb., 330.

99. Where a record shows that the prisoner was brought to the bar in the custody of the sheriff, and then, setting out the drawing, &c., of the jury and their verdict, contains this entry,

"the prisoner is remanded," the presence of the prisoner during the whole trial appears with sufficient certainty. *State v. Langford*, Busb. 436.

100. Where a defendant, upon conviction, is ordered into custody until the fine and costs be paid, and is permitted by the sheriff to escape, it is no discharge of the judgment, which may still be enforced. *State v. Simpson*, 1 Jones, 80.

101. Where there are two counts in a bill of indictment, and evidence of two similar offences proved, the court will not order the solicitor to select one of the counts and abandon the other. *State v. March*, 1 Jones, 526.

102. Where a jury, after rendering an insufficient verdict, in a capital case, is discharged without any objection from the prisoner, he may, if the verdict purports to be one of "guilty," be tried again. *State v. Woodly*, 2 Jones, 276.

103. Where the record of a conviction for murder shows that a grand jury was drawn, empaneled, sworn and charged to enquire for the State, of and concerning all offences, &c., and by such grand jury, "it was presented in manner and form following, that is to say," &c., (setting out the bill of indictment,) the record is sufficient to show that the bill of indictment had been properly found, without copying the entry of "a true bill," which is usually endorsed on bills of indictment, and the judgment will not be arrested for such omission. *State v. Guilford*, 4 Jones, 83.

104. Such a record is sufficient to show that the prisoner was tried upon a bill of indictment as required by the act of 1797, instead of a mere presentment. *Ibid.* (See Rev. Code, ch. 35, sec. 6.)

105. Where there are three counts in a bill of indictment, and testimony was offered as to one only, a verdict of guilty, though general, will be presumed to have been given on that count to which the testimony was applicable. *State v. Long*, 7 Jones, 24.

106. Where a defendant was put upon his trial for petit larceny, and the term expired before the jury could agree upon their verdict, and they left their room and dispersed without returning a verdict, and the defendant went at large without being recognized to appear again, *it was held* that the solicitor for the State might, without leave of the court, have a *capias* issued to take the defendant and put him upon trial again. *State v. Tilletson*, 7 Jones, 114.

107. Where, upon the arraignment of one for murder, it was suggested that the accused was a deaf mute, and was incapable of understanding the nature of a trial and its incidents, and his rights under it, *it was held* proper for a jury to be empaneled to try the truth of these suggestions, and if they should find them to be true, then the court would decline to put the prisoner on his trial. *State v. Harris*, 8 Jones, 136.

108. Upon the conviction of a prisoner in a capital case, the sentence of the court must be carried into execution by the sher-

iff of the county where the trial took place, and it is erroneous for the court to order it to be executed, in the county from which it was removed, by the sheriff of that county. *State v. Twiggs*, 1 Winst., 142.

109. When the record of indictment states that the bill was found by a grand jury, but does not show that it was endorsed "a true bill," it is sufficient; and it is not erroneous that the record omits to state that the witnesses, upon whose testimony the bill was found, were sworn before they were sent. *State v. Harwood*, 1 Winst., 228.

110. It is not a ground upon which to arrest the judgment, that the two offences of permitting a slave to go at large as a free person, and of permitting him to keep house as a free person, are joined in the same count of an indictment. *State v. Brown*, 2 Winst., 54.

See (Indictment—Plea of former acquittal or conviction, 6-7-8.) (Jury—Of the conduct and province of the jury in the trial of causes, 1-3-5-7-8-9-10-11.) (Practice—Removal of causes, 2-6-23.) (Practice—Of the trial and its incidents, 13-14-15-17-18-19-20.) (Retailer of spirituous liquors, 3.)

IV. HOW A PRESENTMENT IS TO BE MADE, OR A BILL FOUND.

1. A presentment need not be signed by all the grand jury. It should be handed to the court by the foreman, who is the organ of the grand jury, to and from whom communications are made with the court. It should be made in the presence of the jury, but when entered of record no further evidence is required of its authenticity. *State v. Cox*, 6 Ired., 440.

2. Neither the presentment of a grand jury, nor a bill of indictment requires that it should be signed by any one. It is the returning of the bill of indictment, publicly in open court, and its being there recorded that makes it effectual. *Ibid.*

3. Where, on the back of a bill of indictment, the clerk of the court has certified, that certain witnesses were sworn and sent to the grand jury, it is sufficient evidence that the bill was sent to the grand jury. *State v. Collins*, 8 Ired., 407.

4. For the difference between a presentment and an indictment, see *State v. Guilford*, 4 Jones, 83.

V. EFFECT OF A NOLLE PROSEQUI.

1. A *nolle prosequi*, in criminal proceedings, does not amount to an acquittal of the defendant, but he may be again prosecuted for the same offence, or fresh process may be issued to try him on the same indictment, at the discretion of the prosecuting officer. The defendant, however, when a *nolle prosequi* is entered, is

not required to enter into recognizance for his appearance at any other time. *State v. Thornton*, 13 Ired., 256.

2. A *capias*, after a *nolle prosequi*, does not issue as a matter of course at the will of the prosecuting officer, but upon permission of the court first had, and the court will always see that its process is not abused to the oppression of the citizen. *Ibid.*

See (Indictment—Of the trial, verdict and judgment, 24–25–55.) (Indictment—Of quashing indictments, 8.) (Indictment—Limitation of time within which an indictment will lie, 10.)

VI. PLEA OF FORMER ACQUITTAL OR CONVICTION.

1. A former conviction of another offence, of a different denomination, grounded on the same facts as those now relied on, is a bar. *State v. Ingles*, 2 Hay., 4, (148.)

2. Where there was an acquittal, on an indictment for perjury on an *affidavit to continue a cause*, and then the defendant was indicted again on the same *affidavit with an intention to procure an attachment to issue*, it was held that the plea of “former acquittal” to the second indictment was not sustained. *State v. Williams*, Conf. Rep., 474, (528.)

3. Where one was acquitted on a charge of stealing a note of a certain bank, on an account of a mistake in setting forth the name of the corporation, he cannot sustain a plea of former acquittal, when charged for the same act in an indictment which states the proper corporate name of the bank. *State v. Williamson*, 3 Murph., 216.

4. Where two bills were found against the same person at the same term, in one of which he was charged with burglary and larceny, and in the other, with robbery, in the felonious taking the same goods; and the prisoner was tried on the first bill and convicted of the larceny only; held that he could not be put on his trial on the second indictment, because it would conflict with the principle “that no one shall be twice put in peril for the same crime;” and on the refusal of the attorney general to pray judgment on the conviction for larceny, the prisoner was allowed his clergy and discharged. *State v. Lewis*, 2 Hawks, 98.

5. Where a bill of indictment for an assault and battery was found in the superior court against a person, who was subsequently, but before being taken to answer the charge in the superior court, indicted and convicted in the county court for the same offence, it was held that the county court had jurisdiction of the case, notwithstanding the bill found in the superior court, and to that bill he might plead his former conviction in the county court. *State v. Tisdale*, 2 Dev. and Bat., 159.

6. The finding of a bill does not confine the State to that single bill; another may be preferred, and the party put to trial on it, although the first remains undetermined. *Ibid.*

7. If two indictments for the same offence be found in the same court, the course is to quash one, before the party is put to plead on the other. If in different courts, the defendant may abate the latter, by plea that another court has cognizance of the case by a prior bill. Should a plea in abatement not be made to the second bill, and a conviction be had upon it, such conviction may be plead *puis darrien continuance*, in bar of the first bill. *Ibid.*

8. If, to such a plea, fraud can be replied at all, it must be averred on the record, and is not to be presumed from the mere fact of the former bill having been found. *Ibid.*

9. An acquittal upon an indictment for a rape against a person of color, cannot be pleaded in bar to an indictment against the prisoner, for an assault with intent to commit the rape upon a white female, under the act of 1823, because both offences are felonies created by different statutes, and the latter requires different allegations in the indictment, and different proof on the trial from the former; and because an indictment for the commission of a felonious act is not supported by proof of an intent to do that act, and an indictment for the latter, if a felony, may be sustained after an acquittal upon indictment for the former. *State v. Jesse*, 3 Dev. and Bat., 98.

10. Where a person of color had been acquitted upon an indictment for a rape, and is subsequently indicted for an assault with intent to commit the rape upon a white female, he cannot object upon the trial that the evidence proves an actual rape, because the jury may convict for the specific charge contained in the indictment, notwithstanding it may also prove the other charge for which the prisoner had been formerly tried and acquitted. *Ibid.*

11. A former acquittal, if it cannot be pleaded in bar to a subsequent indictment, cannot be taken advantage of as an estoppel. *Ibid.*

12. It is not sufficient to make a judgment in one indictment a bar to another, that evidence of the facts alleged in the first would also be evidence of the facts alleged in the other; as an acquittal upon an indictment for burglary and stealing is not a bar to a second indictment, for the burglary *with the intent to steal*. *Ibid.*

13. An acquittal upon a former indictment can be no bar to a second, unless the former were such as the prisoner might have been convicted upon, by proofs of the facts contained in the second. *Ibid.*

14. The plea of *autrefois acquit* is no available defence, unless the facts charged in the second indictment would, if true, have been sufficient to support the first. Thus, where the defendant was indicted for retailing spirituous liquor to one J. S., and it appeared that, upon the same facts, under a former indictment for "retailing to some person to the jurors unknown," he had

been acquitted, upon the ground that the retailing was to the said J. S., and not to one unknown, *it was held* that the plea of *autrefois acquit* was no bar to the second indictment. *State v. Birmingham*, Busb. 120. S. P., *State v. Revels*, Busb., 200.

15. Where a bill of indictment for an assault and battery was found against the defendant in the superior court, and pending the same, after his knowledge thereof and before his arrest, he procured himself to be indicted for the same offence in the county court, and there voluntarily submitted and was fined, *it was held* that the conviction in the county court was a good plea in bar to the indictment in the superior court. *State v. Casey*, Busb., 209.

16. Where a person has been tried and convicted in the county court for an affray, he cannot be indicted and tried in the superior court for the same act, on a bill for an assault and battery. *State v. Stanly*, 4 Jones, 290.

See (Evidence—In criminal proceedings and indictments, 75.)

VII. OF QUASHING INDICTMENTS.

1. An indictment for a forcible entry, which was found solely upon the testimony of one who, upon a conviction, would be entitled to restitution of possession, will be quashed. *State v. Fellows*, 2 Hay. 340, (520.)

2. The court will quash an indictment, when it is plain that no judgment can be rendered in case of a conviction; as when the day, on which the offense was committed, is not laid in the indictment. *State v. Rouch*, 2 Hay., 352, (540.)

3. The court will not quash an indictment for larceny, unless the defect be plain and obvious. Hence, they refused to quash where the caption of the indictment was as follows: "State of North-Carolina, Franklin county, March sessions, 1798." *State v. Jeffreys*, Conf. Rep., 364, (441.)

4. In cases of doubt the court will not quash an indictment; because the defendant, if convicted upon the facts charged, can have the same advantage of legal points upon a motion in arrest of judgment, as upon a motion to quash. *State v. Smith*, 1 Murph., 213.

5. When a bill is found by the same grand jury that made the presentment, on the testimony of some of their own body, not sworn in court as witnesses, such proceeding is in opposition to the act of 1797, and the bill must be quashed. *State v. Cain*, 1 Hawks, 352. (See Rev. Code, ch. 35, secs. 6 and 7.)

6. The power to quash an indictment, before the defendant pleads, is purely a discretionary one. It is not usually exercised, unless where the defect is gross and apparent, and not then, if the offence be of a heinous nature. *State v. Baldwin*, 1 Dev. and Bat., 195.

7. If an indictment be found without evidence, or upon insuf-

ficient evidence, as upon the testimony of witnesses not sworn, upon proof of the fact the bill may be quashed, or the matter may be pleaded in abatement. *State v. Roberts*, 2 Dev. and Bat., 540.

8. After a motion to quash an indictment containing two counts, one of which is defective, the officer prosecuting for the State may enter a *nol. pros.* as to the defective count, which will remove the ground for the motion to quash, and leave the defendant to be tried upon the charge contained in the good count. *State v. Buchanan*, 1 Ired., 59.

9. If an indictment sufficiently charge any offence, though not the one intended, it cannot be quashed. *State v. Evans*, 5 Ired., 603.

10. Where one count in a bill of indictment charges the offence to have been committed in one county, and another count charges it in another, the counts, as a general rule, will be repugnant, and the indictment will be quashed on motion, or the prosecutor will be compelled to elect the one upon which he will proceed. *State v. Johnson*, 5 Jones, 221.

11. But where a new county is established by act of assembly out of an old one, and the act provides that the felonies, committed in that territory which is now the new county, shall be tried in the superior court of the old county, there is no repugnancy in charging it to have been committed in these two counties, severally, in different counts of the indictment. *Ibid.*

12. On the motion to quash an indictment, on the ground that the witness, on whose testimony it was found by the grand jury, was not sworn in court, it was held that the decision of the judge in the court below on that question of fact was conclusive, and could not be appealed from. *State v. Barnes*, 7 Jones, 20.

13. Though it is discretionary with the court whether they will quash an indictment, or leave the party to take advantage of the alleged defect in another manner, yet if the court refuse to quash upon the ground that it holds the indictment to be sufficient, an appeal will lie, and if the judgment be reversed in the supreme court, the cause will be remanded that the court may act upon its discretion. *State v. Brannen*, 8 Jones, 208.

See (Indictment—Plea of former acquittal or conviction, 7.)

VIII. VARIANCE BETWEEN THE ALLEGATIONS AND PROOFS.

1. Where an indictment for a libel charged that the defendant set up in public a board, on which was a painting or picture of a human head, with a nail driven through the ear and a pair of shears hung on the nail, and the proof was, that a human head, showing a side face with an ear, a nail driven through the ear and a pair of shears hung on the nail, was inscribed or cut in the board by means of some instrument, but was not painted, it was

held that there was a fatal variance between the allegation and the proof, and that the defendant must, therefore, be acquitted. *State v Powers*, 12 Ired., 5.

2. In an indictment for selling spirits to a slave, the property of one "William Michaels," the proof was, that the slave belonged to "William A. Michael," and *it was held* that, upon the doctrine of *idem sonans*, there was no variance. *State v. Houser*. Busb., 410.

3. Where an indictment alleges a cheating in an executed contract, and the proof establishes an attempt to cheat in an executory contract, which was abandoned before its consummation, there is a variance which is fatal. *State v. Corbett*, 1 Jones, 264.

4. Where an indictment charged that the mortal blow was given on the 27th December, and that the deceased, then and there, instantly died, and the evidence was that he lived for twenty days after receiving the blow, *it was held* that the variance was immaterial. *State v. Baker*, 1 Jones, 267.

5. An indictment charging the defendant with going into a religious congregation engaged in actual service, and their exhibiting himself drunk, and by cursing and swearing with a loud voice, and by making indecent gestures and grimaces, disturbing it, is not sustained by proving that he disturbed it by striking the meeting house on the outside with a stick. *State v. Sherrill*, 1 Jones, 608.

6. An allegation in a bill of indictment for murder, that a husband drove his wife out into the open air and there left her, whereby she came to her death, is not supported by proof that she voluntarily and unnecessarily remained in the open air, whereby her death was caused. *State v. Preslar*, 3 Jones, 421.

7. The allegation of a bill of indictment, charging A and four others with an assault on B, is not proved by the production of a record which sets forth a bill of indictment, charging A and five others with an assault on B. *State v. Harvell*, 4 Jones, 55.

8. The question as to what is a variance between the allegation and proof is one of law, and when made in the court below may be reviewed in the supreme court upon an appeal. *Ibid.*

9. An allegation in an indictment, charging that the defendant stole a certain *fi. fa.* "issued from the superior court office," is not sustained by proof that the *fi. fa.* was made out, but retained by the clerk, at the instance of the defendant, until the amount was paid by him. *State v. McLeod*, 5 Jones, 318.

10. If the name of the owner of a slave be set forth in an indictment against one for unlawfully trading with the slave, it must be proved as laid, and a variance will be fatal. *State v. Johnston*, 6 Jones, 485.

11. Upon an indictment for the felonious burning of a barn with grain or corn in it, the prisoner cannot be committed upon proof that he burned a *crib* with grain or corn in it. *State v.*

Laughlin, 8 Jones, 354.

12. Whether, where the manner of a homicide charged in a bill of indictment is by cutting the throat of the deceased with a knife, and the proof is, that it was done by blows inflicted on the head with a gun, the variance is material, *quaere*. *State v. Murph*, 1 Winst., 129.

13. A charge, in a bill of indictment, of a burglary with intent to steal, is supported by proof that it was committed with intent to rob. *State v. Cody*, 1 Winst., 197.

See (Perjury, 1-6-8-16-24.)

IX. LIMITATION OF TIME IN WHICH AN INDICTMENT WILL LIE.

1. The indictment, under which a defendant is brought to trial for trading with a slave under the 75th section, ch. 34, of the Revised Statutes, must be commenced within twelve months after the commission of the offence, according to the 80th section of the same chapter; and it is no answer to this objection, that another indictment for the same offence was brought within the proper time. *State v. Tomlinson*, 3 Ired., 32. (See Rev. Code, ch. 34, secs. 84 and 89. The 80th section of the Rev. Statutes, ch. 34, seems to be omitted in the Rev. Code, and the indictment may be brought within two years, as provided for other misdemeanors by the 8th sec. of the 35th ch. of the Rev. Code.)

2. A presentment, made within two years after the commission of a misdemeanor, on which an indictment is founded, is a commencement of a prosecution within the meaning of the act, and prevents the statute of limitations from attaching. *State v. Cox*, 6 Ired., 440.

3. On an indictment for marrying a female infant under the age of fifteen years, where the defendant relies upon the statute of limitations as to prosecutions for misdemeanors, proof that the marriage was by consent of the mother, and was solemnized by a minister of the gospel in the presence of six or seven persons, and that the parties lived together afterwards openly as man and wife, shall protect the defendant from the operation of the *proviso*, that the offence was committed in secret. *State v. Watts*, 10 Ired., 369. (See Rev. Code, ch. 35, sec. 8.)

4. So, where the parties went to an adjacent county to be married, and afterwards returned to the county of their domicil, where they lived together as man and wife, the fact being known to the community, and the defendant continuing in the open exercise of his duties as a minister of the gospel, it cannot be held that he absconded from the county, in which he was married, or concealed himself, so as to bring his case within the operation of the second part of the said *proviso*. *Ibid.* (See Rev. Code, ch. 35, sec. 8.)

5. It is not necessary nor convenient to introduce, in an in-

dictment for a misdemeanor to which the statute of limitations applies, averments, with a view of taking the case out of the statute, by bringing it within the *proviso*. *Ibid*.

6. The offence of conspiracy to cheat and defraud is not embraced within the exceptions of the act, Rev. Stat., ch. 35, sec. 8, limiting the time within which prosecutions for misdemeanors shall commence. *State v. Christianburg*, Busb., 46. (See Rev. Code, ch. 35, sec. 8.)

7. The word "deceit" in the act seems to have been used for "cheating by false tokens," which offence may be committed by one person, and is distinct from the offence of "conspiracy," the gist whereof consists in the confederation by two or more to do the act charged. *Ibid*.

8. The State, on a trial for a misdemeanor, is not restricted in its proof to the time stated in the indictment, where the time is not a part of the offence, but may show that it was committed at any time within two years previous to the finding of the bill. *State v. Newsom*, 2 Jones, 173.

8. Where a bill of indictment for a misdemeanor was found against the defendant by a wrong name, which he abated by plea, and a second bill was sent and found, *it was held* that the second bill was but a continuation of the first, which had been found within two years after the commission of the offence, and that was sufficient, though the new bill was found after the two years. *State v. Hailey*, 6 Jones, 42.

10 If, in such case, the solicitor for the State had entered a *nol. pros.*, and discharged the defendant, he might, by virtue of the proviso in the Rev. Code, ch. 35, sec. 8, have sent a new bill within one year, both indictments being against the *same person* for the same offence. *Ibid*.

INFANTS AND INFANCY.

1. An infant who has been arrested in a civil suit, will be discharged from custody on motion, upon the fact of infancy being made to appear to the court by inspection, or the examination of witnesses. *Henry v. Smith*, Mar., 56, (54.)

2. When an infant, who had conveyed his land by a deed, after coming of age had said to the bargainee: "I will never take advantage of my having been an infant at the time of executing the deed, and it is my wish that you should keep the land," it was *held* to be a confirmation of his deed, notwithstanding he afterwards conveyed the same land to another.

Houser v. Reynolds, 1 Hay., 143, (166.) (See *Hoyle v. Stowe*, 2 Dev. and Bat., 320.)

3. A promise, to defeat the plea of infancy, must be an express one, made after the infant came of age. *Alexander v. Hutcheson*, 2 Hawks, 535.

4. The promise, made by a person to perform a contract entered into while he was an infant, may be inferred from any words or acts which show the acquiescence or assent of his mind. It is, however, an inference of fact, to be drawn by a jury. *Alexander v. Hutcheson*, 1 Dev. 13.

5. If an infant live with his father, who provides for him every thing which, in his judgment, appears to be proper, the infant cannot bind himself to a stranger, even for such articles as might, under other circumstances, be deemed necessities. But if the infant live apart from his father, laboring and receiving the profits of his labor for his own use, he is *pro tempore* acting as his own man, by the assent of his father, and will be liable for necessities suitable to his condition. *Smith v. Young*, 2 Dev. and Bat., 26.

6. The question, whether necessities or not, is a mixed one of law and fact. Whether the articles furnished to an infant are of the classes, for which he is liable, is a matter of law; whether they were actually necessary and of a reasonable price, is a matter of fact. *Ibid.*

7. A deed of bargain and sale made by an infant is avoided by his executing, at his arrival of full age, another deed of the same kind, and for the same land, to another person. *Hoyle v. Stowe*, 2 Dev. and Bat., 320.

8. *It seems* that to ratify a bargain and sale made by an infant, some act done after full age, proceeding upon the notion that the estate created by the deed subsists, is necessary, as the receipt of the purchase money and the like. *Ibid.*

9. The disability of infancy can be insisted on only by the infant, or his privies in blood; and privies in estate cannot take advantage of it. But after the infant has avoided his deed, it may be disaffirmed by any person. *Ibid.*

10. A feofment by an infant must be avoided by an entry, before another person can maintain ejectment, because it passes the land itself, and creates a defeasible estate. But a deed operating under the statute of uses does not transfer the land, and only such uses are executed as are enforced in chancery; and no use is there raised by the contract of an infant to sell his land. *It seems*, therefore, that it may be disaffirmed without an entry, and by plea of not guilty and *liberum tenementum*; and also that ejectment cannot be maintained on it, without showing a confirmation after full age. *Ibid.*

11. The possession of a vendee taken under a deed from an infant, whether that deed is to be considered as void or voidable

only, is adverse to the infant—and much more is such the case where the deed has been executed by the infant jointly with others—and the infant cannot, after he comes of age, convey a valid title to the land, while such adverse possession continues. *Murray v. Shanklin*, 4 Dev. and Bat., 289.

12. Where an infant executed a deed for land, by signing, sealing and delivering it, and after he came of age endorsed on it “I have signed the within deed for the expressed purposes; and with the desire to ratify the same I hereunto affix my hand and seal,” and after signing and sealing the endorsement, delivered the instrument to the vendee again, *it was held* that, if the deed were absolutely void in the first instance, it was rendered valid by the re-delivery, and if only voidable, the endorsement under the hand and seal of the vendor was a proper act of confirmation. *Ibid.*

13. A contract made by an infant to work a certain specified time with a carpenter, upon the consideration of the latter's boarding and clothing him, and learning him the trade, is not binding upon the infant, and he may, at any time, leave the service of the carpenter, provided he has not arrived at full age and confirmed the contract. *Francis v. Felmit*, 4 Dev. and Bat., 498.

14. If an infant have been furnished with necessaries, while working with a mechanic to learn his trade, upon an action of assumpsit brought against the infant for the value of the necessaries, it is a good defence under the plea of *non assumpsit*, that the defendant's services in work and labor were equal to, or exceeded in value, the necessaries furnished. *Ibid.*

15. Where an infant purchased land and gave his note for the purchase money, and, after he became of age, continued in possession of the land and promised to pay the note, *it was held* that this was a confirmation of a contract by the infant after he became of age, and he and his representatives were bound by it. *Armfield v. Tate*, 7 Ired., 258.

16. A person cannot recover of an infant, who has a guardian, for board and other necessities, where the charges exceed the infant's income. *Hussey v. Rountree*, Busb., 110.

17. A step-father, though he is not bound to support his step-children, nor they to render him any service, yet if he maintain them, or they labor for him, in the absence of any express agreement, they will be deemed to have dealt with each other as parent and child, and not as strangers. *Ibid.*

18. A having sold a horse to B, an infant, and taken a note for the price, and B having refused to pay, the contract was rescinded, the horse returned and the note surrendered. *It was held* in an action on the case by A against B, for an injury to the horse while in B's possession, that the sale was binding upon A; that B was possessed under it as owner, and not as bailee, and

that consequently the action would not lie. *Poe v. Horne*, Busb., 398.

19. Where an infant, who was sued on a bond given for two old slaves, after he came of age proposed in writing to give them back and pay half the note, and added "if they will not accept the above offer, I will have to pay them I suppose, but I shall do so at my convenience, as it will be nothing less than a free gift on my part, the negroes being entirely valueless;" *it was held* that this did not render the infant liable on his bond. *Dunlop v. Hales*, 2 Jones, 381.

20. The law will imply a promise, on the part of infants having no parents or guardian, to pay for necessities furnished to them. *Hyman v. Cain*, 3 Jones, 111.

21. A compromise made by an infant legatee, whereby he received specific chattels of less value than the legacy, is not binding on him; but he is bound to account for the value of the things he received, and a deduction of the amount of such value must be made from the legacy. *Tipton v. Tipton*, 3 Jones, 552.

22. Timber, furnished an infant to enable him to build a dwelling house on his land, is not a *necessary*, for which he can be made liable. *Freeman v. Bridger*, 4 Jones, 1.

23. An infant, who has a guardian, cannot contract even for necessities. *Ibid.*

24. Where an infant bastard grandson was recognized, raised and taken care of by his grandfather until he was fifteen years old, *it was held* that the relation between the parties rebutted the implication of a promise by the grandfather, to pay for work and labor done by the boy on his grandfather's farm. *Hudson v. Lutz*, 5 Jones, 217.

25. Although, at common law, a boy under fourteen years of age is not indictable for an ordinary assault and battery, yet if the battery be of an aggravated kind, as if it be a maim, or be done with a deadly weapon, or if it be an act prompted by unbridled lust, as an attempt to commit a rape, he may be indicted and punished, if it appear that he was *doli capax*. *State v. Pugh*, 7 Jones, 61.

26. An infant, who has executed a deed for land, cannot make the deed either void or valid by any act of his, done while under age. And to make the deed valid, he must, after coming of age, do some deliberate act, by which he takes benefit under the deed, or expressly recognizes its validity. *McCormic v. Leggett*, 8 Jones, 425.

See (Judgment—Of irregular, void and erroneous judgments, 33.) (Practice—Appearance and proceedings against one of several defendants, 5.) (Habeas corpus, 1-2.)

IN FORMA PAUPERIS.

See (Costs—Security for costs, 2-4-5.)

INJUNCTION BOND.

See (Bonds—Of the construction of bonds, and of their condition, 4-10-14-15-16-17-19.) (Bonds—Proceedings in suits upon bonds, 9.) (Debt—When the action will lie, 5.)

INNS AND INNKEEPERS.

1. A common innkeeper is liable for any loss his guest may sustain in his property, except it be by the agency of a servant or companion of the guest himself, or where, when the inn is full, the guest is admitted upon terms. *Quinton v. Courtney*, 1 Hay., 40, (51.)

2. An individual, who acts as ordinary keeper, without taking out license and giving bond, but who has a license to retail spirituous liquors, may be indicted under the act of 1798 for exacting more than the rates established by the court of his county, and he is estopped from denying that he is a tavern keeper. *State v. Wynne*, 1 Hawks., 451. (See Rev. Code, ch. 79, sec. 3.)

3. One who entertains strangers only occasionally, although he receives compensation for it, is not an innkeeper; and if on such occasions, gambling, drinking and fighting take place, he is not indictable as the keeper of a disorderly house. *State v. Matthews*, 2 Dev. and Bat., 424.

4. An innkeeper is, by the custom of the land, liable as an insurer, for the goods and animals which his guest has with him for the purpose of his journey. But if his customer is only a boarder, or the goods and animals are entrusted to the landlord upon a special contract, or if they are not placed in the inn or its appurtenances to be kept, he is only liable for negligence as any other bailee. Hence, an innkeeper is not liable, without proof of negligence, for the loss of a mule put by a drover into a lot belonging to the landlord, separate from the inn, to be kept under a special agreement. *Neal v. Wilcox*, 4 Jones, 146.

INSOLVENT DEBTORS.

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| <p>I. Proceedings under insolvent debtors' acts prior to the act of 1822.</p> <p>II. Proceedings under the act of 1822 and subsequent acts.</p> <p>III. Of the property to be laid off for an insolvent debtor under the acts of 1844 and 1848.</p> | <p>IV. Of the creditor's liability for the maintenance of his debtor in jail.</p> <p>V. Of the priority of the claim of the United States and the State.</p> |
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I. PROCEEDING UNDER INSOLVENT DEBTORS' ACTS PRIOR TO THE ACT OF 1822.

1. Ten days' notice must be given to the creditors before taking the insolvent debtor's oath. *Kennedy v. Fairman*, 1 Hay., 408, (470.) (See Rev. Code, ch. 58.)

2. An insolvent shall not be discharged, if he will not account for property proved to have been in his possession shortly before, and sold to one who had acted as his partner in trade. *Ibid.*

3. A discharge under the insolvent debtor's act, ordered by the proper officers, will be presumed to have been regularly done, until the contrary be shown. *Pearle v. Folsom*, 1 Hay., 413, (477.)

4. Under the first insolvent's act of 1773, the defendant was discharged, only as to those who had commenced suits against him, and to whom notice had been given of the debtor's application. *Ibid.*

5. Previous to the act of 1809, a debtor, imprisoned for debt, was entitled to the benefit of the act for the relief of insolvent debtors, by remaining within the prison bounds, under a bond given for that purpose, for the space of twenty days. *Milel v. Hunter*, 1 Murph., 394. (See Rev. Code, ch. 59, sec. 27, which restores the law as it was before the act of 1809.)

6. When a defendant, in execution under the prison rules, is afterwards thrown into prison by another creditor, he has a right to be discharged from the walls of the prison under the insolvent laws. *In the matter of Huntington*, 2 Murph., 369.

7. A debtor imprisoned under a *ca. sa.*, who takes the oath of insolvency under the provisions of the act of 1773, and is discharged, is protected from arrest at the suit of any other creditor, to whom he was indebted at the time, by virtue of the 39th section of the constitution of this state. *Burton v. Dickens*, 3 Murph., 103. (See Rev. Code, ch. 59, secs. 1 to 6.)

8. To entitle the debtor to this protection, he must deliver up all his property real and personal, *bona fide*, for his creditors. Notice to other creditors is not necessary, although the effect of his discharge, as to them, will be protection from arrest at their suit. *Ibid.*

9. When the debtor delivers up his estate for the use of his

creditors, and commissioners are appointed, who give notice to the creditors to come in and receive their dividends, each creditor has an option to come in or not. If he come and receive his dividend, his debt is satisfied; if he do not, he may sue out execution against such property as the debtor may thereafter acquire. *Ibid.*

10. Where a debtor was taken under a *ca. sa.* at the instance of one creditor, and gave bond with sureties for keeping within the prison bounds, and afterwards was taken under another *ca. sa.* at the instance of another creditor, and committed to close prison, and gave notice to both creditors of his intention to take the benefit of the oath for the relief of insolvent debtors, and accordingly on the day appointed the oath was administered to him, and he was discharged, *it was held* that he was properly discharged as to both, and it was no breach of his bond for the prison bounds that he afterwards went at large. *Howard v. Pasteur*, 3 Murph., 270.

11. In proceedings under the act of 1773, for the relief of insolvents, the single fact to be ascertained is honest insolvency; and when this is ascertained by the mode prescribed, either in the first or third section, the consequence to the debtor is the same; and he is entitled to be discharged from imprisonment as to all creditors by the 39th article of the constitution. *Jordan v. James*, 3 Hawks., 110.

12. The discharge of a debtor from prison under the act of 1773, as modified in the Revised Code, ch. 59, sec. 1, that is, where he shall have remained in prison twenty days and been discharged by two magistrates out of court, will not protect the debtor from arrest at the instance of any other creditor than the one at whose suit he was in prison, even though such other creditor had notice of the debtor's application to be discharged. *Griffin v. Simmons*, 5 Jones, 145.

13. Where one was in close custody for costs, and gave notice to the clerk of his intention to take the oath of insolvency, and the clerk appeared and tendered an issue of fraud before the two justices to whom the application was made, whereupon the justices sent the proceedings to the superior court, in which the costs accrued, *it was held* that, under the 59th ch. of the Rev. Code, the issue was properly triable in that court. *State v. Carroll*, 6 Jones, 458.

See (Prison Bounds.)

II. PROCEEDINGS UNDER THE ACT OF 1822, AND SUBSEQUENT ACTS.

1. A debtor convicted of a fraudulent concealment of his effects upon an issue between him A, and ordered into custody thereupon, according to the act of 1822, is not in execution at the suit of B, another creditor, in whose case no such conceal-

ment was suggested or found. *Folsom v. Gregory*, 1 Dev. 233. (See Rev. Code, ch. 59, sec. 12, and following.)

2. A sheriff is not bound to take notice that the defendant in a *ca. sa.* is not entitled to the benefit of the act of 1822, and where, without actual notice that the contract, on which the action was brought, was prior to the time prescribed in the statute, he took a bond pursuant to the act on executing a *ca. sa.*, it was held that it was not an escape. *Jones v. Dunn*, 1 Dev., 326.

3. A bond given under the act of 1822, for the appearance of an insolvent at court, is good, if it be for double the original debt, exclusive of interest and cost, and judgment may, on motion, be rendered upon it. *Williams v. Yarborough*, 2 Dev., 12.

4. The sureties to a *ca. sa.* bond, taken under the act of 1822 for the relief of insolvent debtors, to protect themselves by a surrender of their principal, must make it in the court to which the *ca. sa.* is returnable, or to the sheriff of the county; and where the writ issues to another county, a surrender to the sheriff of that county is a nullity. *Mooring v. James*, 2 Dev., 254.

5. The right of the plaintiff in the execution to a summary judgment survives to his personal representative. *Ibid.*

6. A condition "to appear and claim the benefit of the act, &c., and not depart the court without leave," is substantially the same as that prescribed in the act. *Ibid.*

7. Where the defendant in a *ca. sa.* appeared at the return day of the writ, and, upon an issue being made up, the cause was continued, and afterwards the defendant made default, held, that the condition was broken, and the plaintiff entitled to judgment. *Ibid.*

8. The defendant in a *ca. sa.* bond, given under the act of 1822, is bound to attend at every term until the cause is finally disposed of. *Arrington v. Bass*, 3 Dev., 95.

9. Under the act of 1822, for the relief of insolvent debtors, the sickness of the surety is no excuse for the default of the principal. *Speight v. Wooten*, 3 Dev., 327.

10. A discharge of an insolvent, under the act of 1822, protects him from arrest by those creditors only, who had notice of his intention to apply for it. *Crain v. Long*, 3 Dev., 371.

11. A defendant, who has given bond under the act of 1822 for the relief of insolvent debtors, cannot object to the informality of the bond, and pray a discharge on account thereof. *Page v. Winningham*, 1 Dev. and Bat., 113.

12. A person, who is surrendered in discharge of his bail, is entitled to the benefit of the act of 1822 for the relief of insolvent debtors. *Smallwood v. Wood*, 2 Dev. and Bat., 356. (See Rev. Code, ch. 59, sec. 6.)

13. The act of 1822 for the relief of insolvent debtors extends only to debts arising *ex contractu*, and not to those incurred for

a penalty, or *ex delicto*.—*Woolard v. Dean*, 2 Dev. and Bat., 490.

14. The bond for the defendant's appearance, under the act of 1822 for the relief of insolvent debtors, connected with the execution, is in the nature of process to compel an appearance, and the return day thereof must be certain. *Winslow v. Anderson*, 3 Dev. and Bat., 9.

15. Where a *ca. sa.* was issued from a spring term of a superior court, returnable to the ensuing fall term thereof, and was executed upon the defendant within less than twenty days of such fall term, and the sheriff thereupon took bond and security from the defendant under the act of 1822, which bond was dated more than twenty days before such term, and was conditioned for the defendant's appearance "at the next superior court of law to be held, &c., on the 7th Monday after the 4th Monday of March next, then and there," &c., and at the next spring term, which sat on the 6th, instead of the 7th Monday after, &c., upon the defendant's not appearing, a judgment was taken upon the bond against him and his surety, *it was held* that the judgment was irregular, and that whether the bond was to be prepared by the sheriff or the defendant made no difference, as the judgment was against the surety as well as the principal, and there was no default of appearance according to the bond, and also that the words "next court" would not control the specified time of the 7th Monday after the 4th Monday of March next. *Ibid.*

16. The act of 1838, which provides that *if any person* shall be convicted, in any court of record in this state, of any crime or misdemeanor, and shall be in execution for the fine and costs of prosecution, and shall have remained in prison for the space of twenty days, he may be discharged in the manner therein prescribed, does not repeal the act of 1831, ch. 13, providing for the hiring out of free negroes and free persons of color for fines imposed upon them, except as the last expression of the legislative will necessarily abrogates so much of that act as stands in the way of its provisions. *State v. Manuel*, 4 Dev. and Bat., 20. (See Rev. Code, ch. 59, sec. 1 and ch. 107, sec. 75.)

17. Upon a schedule filed by one taken under a *ca. sa.*, and desirous to avail himself of the benefit of the act for the relief of insolvents, it is not competent for the court to order, nor for the clerk to issue, a writ to the sheriff to sell the scheduled property, or so much thereof as will satisfy the plaintiff's debt and costs, and have the same ready at the next term to render, "to the court or to the parties entitled to receive the same;" and it is consequently no breach of the sheriff's bond for him to fail or neglect to execute such writ. *Governor v. Harrison*, 4 Dev. and Bat., 461.

18. The property and debts contained in such schedule vest in the sheriff, as assignee, to sell, collect and pay into court for the benefit of all creditors; and the proper course, to enforce the per-

formance of the sheriff's duties in relation thereto, is to have a rule of court on the sheriff to sell the property and collect the debts so assigned, and bring the money into court, and to attach him for a contempt if the rule be not complied with. *Ibid.* (See Rev. Code, ch. 59, sec. 21.)

19. When the principal obligor, in a bond given for his appearance at the county court, to take the benefit of the act for the relief of insolvents, is regularly called at court, and failing to appear judgment is rendered against him and his surety in the bond, the surety has no right, *ex debito justitiæ*, to come in on a subsequent day of the term, and have the judgment set aside, in order to allow him to make a surrender of his principal. In such case the court may, undoubtedly, in the exercise of a sound discretion, set aside the judgment, and allow the surrender; but it is not obliged to do so, but upon good cause shown, as that the party has a good defence, and was kept away by accident or misfortune. *Reynolds v. Boyd*, 1 Ired., 106.

20. It is no objection to a man's taking the insolvent debtor's oath, under the acts of assembly, that he has conveyed, in a deed in trust to satisfy certain creditors, an amount of property greater in value than the amount of debts secured by the deed, when he sets forth the deed in his schedule and surrenders all his resulting interests. *Adams v. Alexander*, 1 Ired., 501.

21. Where one, who applies to take the insolvent debtor's oath, upon rendering a schedule, sets forth in his schedule that he has made a deed in trust of certain property to satisfy certain creditors, and surrenders all his interest in the property mentioned in such deed, it is still competent for the opposing creditor to have an issue made up to try whether the said deed is not fraudulent; and if so found by the jury, to cause the debtor to be imprisoned until he surrenders the property itself. *Ibid.*

22. When a person has been arrested on a *ca. sa.* and given bond for his appearance at court, to take the insolvent debtor's oath, and the case is continued until the next term of the court, a notice served on his creditors ten days before the term, to which the cause is continued, is a sufficient notice under the act for the relief of insolvent debtors. *Watson v. Willis*, 2 Ired., 17. (See Rev. Code, ch. 59, secs. 10 and 11.)

23. If such debtor appear at the first term, or, in case of a continuance, at the term to which the cause was continued, though he has failed to give due notice, or for any other cause is not permitted to take the oath, yet no judgment can be rendered against his sureties in the bond, who are only responsible for his appearance. *Ibid.*

24. On motion for a judgment against the sureties to the bond of a debtor, given under the act for the relief of insolvents, it was objected, first, that the christian names of the plaintiffs were not inserted in either the warrant, judgment or *ca. sa.*, and, sec-

ondly, that the bond was not made to the plaintiffs by their christian names. *It was held* that the first objection was not valid, because the imperfection was cured after judgment by the statute of amendments, and the *ca. sa.* properly pursued the judgment, and gave the officer authority to make the arrest and take the bond; and that the second objection was invalid, because the officer literally pursued the statute in taking the bond, and the averment of the christian names of the plaintiffs in the motion was equivalent to a similar averment in a declaration in debt on such a bond. *Wall v. Jarrott*, 3 Ired., 42, S. P. *Lash v. Arnold*, 8 Jones, 206, overruling *Cohoon v. Morton*, 4 Jones, 256.

25. A debtor arrested under a *ca. sa.* gave bond for his appearance at the county court, and on his appearance an issue of fraud was made up, on which the jury found the fraud and concealment alleged, and the court ordered the debtor to be imprisoned until he made a full disclosure of his effects, from which judgment the debtor appealed, giving bond and security therefor. In the superior court the issue was again tried and found against the debtor, but upon being called he failed to appear. *It was held* that the plaintiffs were entitled to judgment against the sureties to the appeal bond for their debt and costs. Upon such an appeal the debtor is bound to appear in the superior court, as he originally was in the county court. *Wilkins v. Baughn*, 3 Ired., 86.

26. Although the *ca. sa.* on which the debtor was arrested may have been defective, yet it is not competent for the sureties to the appeal bond to make that objection after judgment has been rendered against their principal. *Ibid.*

27. If, upon a *ca. sa.* from a justice returnable to the county court, instead of being returnable before a justice out of court within three months, the defendant upon being arrested gave bond to appear at the county court to take the benefit of the insolvent debtor's law, and he fail to appear at the time appointed, and the court render judgment against him and his sureties, such court cannot hear any objection at the same term against such judgment; and, certainly, it cannot at the succeeding term vacate such judgment. *Dobbin v. Gaster*, 4 Ired., 71.

28. A debtor, who proposes to take the benefit of the insolvent's act may, at any time after his arrest upon a *ca. sa.*, and before he files his schedule, transfer any portion of his property *bona fide* for the payment of any of his debts, contracted before his arrest; for a *ca. sa.* binds nothing but the debtor's body, and leaves his property free to be disposed of for any *bona fide* purpose of discharging his other debts. *Cheek v. Davis*, 4 Ired., 284.

29. Any objection to a bond given, by an insolvent debtor arrested under a *ca. sa.*, must be made at the court to which the bond is returnable and before judgment is rendered on it. *Watts v. Boyle*, 4 Ired., 331.

30. Though the law says that the officer, who has arrested a

person on a *ca. sa.* and taken bond for his appearance at court, shall return the process and bond *on or before* the second day of the term, yet the court may, if it think proper, order him to return them on the first day. *Ex parte Summers*, 5 Ired., 149.

31. Where a person is arrested on a *ca. sa.*, and an issue of fraud is made up between him and his creditor in the county court, and upon the issue being found against the debtor, he appeals to the superior court, the sureties for the appeal are bound absolutely for whatever judgment may be rendered against their principal in the superior court; and such sureties have no right to surrender their principal to the sheriff in discharge of themselves. *Williams v. Floyd*, 5 Ired., 649.

32. Under the insolvent debtor act of 1822, the discharge of a debtor, arrested on a *ca. sa.* at the instance of a creditor, operated only against those creditors who had been duly notified, under the provisions of that act. *Ibid.*

33. Where a debtor is arrested under different *ca. sas.* at the instance of several creditors, he has a right under the act, Rev. Stat., ch. 58, sec. 20, if he apply for his discharge as an insolvent debtor, and fraud is suggested in answer to his application, to require that all the creditors he may notify shall join in the trial of *one* issue, and the court will so direct. But this is for the ease of the debtor, and he may waive the privilege by joining issue with each creditor, and then a verdict in his favor in one case will not discharge him from his liability in the case of another creditor. *Ibid.* (See Rev. Code, ch. 59, secs. 11 and 16.)

34. Where a debtor has been arrested on a *ca. sa.* and given bond for his appearance at court under the act, and the sureties surrender him and he is ordered into custody, the *committitur* is in execution, and the sheriff has no power to discharge the debtor out of prison, of his own will, and without the order of the court. *Wright v. Roberts*, 6 Ired., 119. (See Rev. Code, ch. 59, sec. 6, from which it appears the debtor may give bond and security, when committed in execution by the court after judgment.)

35. Where an insolvent debtor, in filing his schedule, only surrenders his interest in certain property conveyed by a deed in trust, and the jury, upon an issue, find the deed fraudulent, he must be imprisoned until he makes a surrender of the whole property so conveyed. *Hutton v. Self*, 6 Ired., 285.

36. After a debtor arrested upon a *ca. sa.* has given bond with sureties, to take the benefit of the insolvent debtor's act, and has joined in an issue tendered by the plaintiff upon a suggestion of fraud, it is too late for him or his sureties to bring forward an exception to the *ca. sa.* under which he was arrested. *Freeman v. Lisk*, 8 Ired., 211.

37. Where a debtor, alleging that he is insolvent, appears in court under an arrest and bond given, he can only be discharged

by taking the oath prescribed by law, or by the act or consent of the creditor. *Ibid.*

38. If an issue of fraud has been made, there cannot, as to that, be a nonsuit. *Ibid.*

39. In a proceeding under the insolvent law, when the debtor has been arrested under a *ca. sa.*, it is too late for him, after giving bond and joining in an issue of fraud, to take exception to the writ of *ca. sa.* *Nixon v. Nunnery*, 9 Ired., 28.

40. Although a *ca. sa.* may be void, yet the court has jurisdiction of the subject matter, and objections to any part of the proceedings must be made in apt time. *Ibid.*

41. When the creditor alleges fraud, if his specification be not sufficiently certain, and a defendant, before issue joined, objects to it, and the court should refuse to make it certain, it would be error. But an objection to the specification will be too late after issue joined, because the verdict may cure the defect. *Ibid.*

42. It is not necessary that the land, alleged to have been fraudulently conveyed by the debtor, should be over the value of ten dollars. The law does not permit the debtor to convey land or any other *visible* property, with intent to defraud, no matter how small the value. *Ibid.*

43. Where a defendant has been arrested upon *mesne* process and given bail, and after judgment the bail surrenders him to the sheriff, out of term time, no execution having been issued on the judgment, nor any *committitur* prayed by the plaintiff, if the sheriff cannot take a bond from him to appear at court and take the benefit of the insolvent law, and if he do and release the defendant, he is guilty of an escape. *State v. Ellison*, 9 Ired., 261.

44. The act, Rev. Stat., ch. 58, sec. 7, only applied to cases where the debtor, upon a surrender of his bail, is ordered into custody by the court. *Ibid.* (Altered so as to embrace a case of surrender by bail out of court. See Rev. Code, ch. 59, sec. 6.)

45. After a surrender by bail, if the creditor, upon reasonable notice, will not charge the party in execution, either a *habeas corpus* or a *supersedeas* would be issued by the court. *Ibid.*

46. Although the bond of a debtor, arrested upon a *ca. sa.* within twenty days of the term of a court, should be conditioned for his appearance at the term next succeeding to that, yet the debtor may waive this privilege, and give a bond for his appearance at the first term, and this bond shall be valid. *Hardison v. Benjamin*, 9 Ired., 331.

47. A bond taken for the defendant's appearance under a *ca. sa.*, issued by a justice in Buncombe county, ought to be returned to the county court of that county, notwithstanding the provisions of the act of 1844, abolishing jury trials in the county courts of that county. *Fox v. Wood*, 11 Ired., 213.

48. In the case of a proceeding under the insolvent debtor's law, the court has authority to permit the schedule to be amen-

ded, so as to make more certain the description of the defendant's interest in matters there set forth, at any time before the oath is administered; and if the plaintiff be surprised by such amendment, it is a ground for a continuance. *McLeod v. Kinkham*, 11 Ired., 509.

49. It is sufficient to file the evidence, of the debts, set out in the schedule, which are in the possession and control of the defendant, at any time before the oath is administered. *Ibid.*

50. It being a matter of public notoriety, that proclamation money is wholly worthless, it is not necessary to state in the schedule the amount thereof with nicety, or to file the same. *Ibid.*

51. A bond given by a person arrested on a *ca. sa.*, for his appearance at court, is required by law to be made payable to the plaintiff in the execution; and if the bond be made payable otherwise, the court cannot enter a summary judgment upon it. *Williams v. Bryan*, 11 Ired., 613.

52. Where a person, arrested on a *ca. sa.*, gave a bond payable to A B, who made the affidavit for the *ca. sa.*, styling himself the agent of C. D., the plaintiff, no action can be maintained on such bond in the name of C. D., because he is not the obligee in it. *Ibid.*

53. Where a party, who has been arrested under a *ca. sa.*, gives bond for his appearance, &c., he may, when a judgment is moved for upon an alleged breach of the bond, adduce any matter which amounts to a defence. *Robinson v. McDugald*, 12 Ired., 136.

54. A defendant was arrested under a *ca. sa.* and gave bond as required by law, the plaintiff was permitted to amend his execution and the defendant allowed to appeal; in the superior court the plaintiff moved to dismiss the appeal, on the ground that the appeal was improvidently granted, and the motion was sustained by the court and the appeal ordered to be dismissed; and it was held that the plaintiff was not then entitled, in the superior court, to a judgment for his debt and costs against the defendant and his sureties on the appeal bond. *Chunn v. Jones*, 12 Ired., 251.

55. The writ of *ca. sa.*, as well as the affidavit authorizing it, must correspond with the judgment upon which it is issued. Therefore, where a judgment was obtained against A and B jointly, and a *ca. sa.* issued against A alone, it was held that the proceedings were irregular, and the defendant was entitled to be discharged. *Judson v. McClelland*, Busb., 262.

56. Where a bond was returned to the county court, for the appearance of a debtor, under the act for the relief of insolvent debtors, with A, B and C as his sureties, and such person and his sureties were discharged from "all liability on his bond," and the defendant in the execution gave a new bond for his further appearance at court with A and D as his sureties, and

the case was then continued for three terms, when a judgment was entered against A, B and C, the sureties on the first bond, *it was held* that the judgment was improper and void. *Cohoon v. Morris*, 1 Jones, 218.

57. Upon an appeal to the superior court from the judgment above mentioned, *it was held* that no judgment could be given in that court upon the bond of A and D, because it was not before the court, and that no judgment could be given upon either bond against A alone. *Ibid.*

58. Where a *ca. sa.* bond was taken, payable to the person who had the equitable interest in the claim, and a judgment was taken on it, in default of the obligor, in favor of the legal owner, *it was held* that the judgment was erroneous, and might be set aside on motion, made the day subsequent to that on which the judgment was rendered. *Earle v. Dobson*, 1 Jones, 515.

59. Upon an issue of fraud, under the insolvent debtor's act, where a debtor had conveyed all his visible property in trust, and many circumstances tended to show that by a fraudulent collusion with the trustee and another, a large amount of the property of the debtor had been transferred by the trustee to the debtor's son, a youth of eighteen without means, *it was held* to be error in the judge, after assuming that the deed in trust and sale to the son might be fraudulent, to instruct the jury that they should not find the issue against the debtor, unless they believed that the property was purchased for him. It should have been submitted whether the transfer to the son was *bona fide* and for value paid by him. *Adams v. Beaman*, 3 Jones, 140.

60. A debtor, under the 4th section of the 58th chapter of the Rev. Statutes, is entitled to insist that suggestions of fraud made by a creditor shall be verified by his oath and tried by a jury; and a judge cannot decide upon the necessity of such suggestions, and the making up an issue to be submitted to the jury. *Purvis v. Robinson*, 4 Jones, 96. (See Rev. Code, ch. 59, sec. 3.)

61. No judgment can be taken in the county court upon a *ca. sa.* bond, if the debtor appear when called at the court to which he is bound, although his surety does not surrender him. But if a judgment be erroneously rendered, and he appeals to the superior court, he is still bound to appear when called in the regular course of that court, and if he fail to do so, the plaintiff will be entitled to judgment against him and the sureties to his appeal bond. *Mears v. Speight*, 4 Jones, 420.

62. Upon the surrender in court of a debtor by his sureties, it is sufficient, in order to have him committed into custody, that the affidavit filed by the plaintiff alleges, "that the defendant is about to remove from the State." *Farmers' Bank of North Carolina v. Freeland*, 5 Jones, 326.

63. In the twenty days, within which under the 8th sec., 59th ch. of the Rev. Code relating to insolvent debtors, a *ca. sa.* must

be executed, Sundays are included. *Drake v. Fletcher*, 5 Jones, 410.

64. Where, to a schedule filed by an insolvent debtor, a creditor alleged in his specifications of fraud, that two notes had been fraudulently transferred to secure a feigned debt, and the jury, upon an issue submitted to them, found the allegations to be true, whereupon the debtor filed a new schedule, admitting that the debt secured by the deed in trust was feigned, but to acquit himself of the fraud made other allegations, among which one was that the trustee had run away with the funds, and he surrendered his claim upon the trustee, *it was held* that, though the creditor could not make any other suggestions of fraud upon the first schedule, yet he had a right to do so as to matters set out in the second schedule. *Farrar v. Redwine*, 6 Jones, 143.

65. When a defendant gives a bond for his appearance at court, and while he is at large by virtue thereof, he is not entitled to be discharged on account of the fact that the *ca. sa.*, under which he was taken, is voidable; nor can he move, while thus at large, to quash the proceedings on that account. *Bryan v. Brooks*, 6 Jones, 580.

66. If an insolvent debtor omit to include in his schedule property assigned to him by commissioners, under the act, Rev. Code, ch. 45, secs. 8 and 9, he cannot be convicted of a *fraudulent concealment* of it, although it is a chose in action which could not be assigned to him under the act. *Ballard v. Waller*, 7 Jones, 84.

See (Judgment—Of the effect of a judgment, 12.) (Judgment—Of irregular, void and erroneous judgments, 39.) (Prison Bounds.)

III. OF THE PROPERTY TO BE LAID OFF TO AN INSOLVENT DEBTOR.

1. A householder, who wishes to avail himself of the act of 1844, may do so, by making application and procuring the assignment to be made according to the act, at any time, (even after a levy of an execution or attachment,) before the property is changed or converted by a sale. *State v. Floyd*, 11 Ired., 496. (See Rev. Code, ch. 45, secs. 8 and 9.)

2. Where, under the act of 1848, three freeholders are appointed to lay off the property of an insolvent debtor to be exempt from execution, they have authority, under the words "other property," to set apart, for the use of the debtor, a mare and five hogs, provided these articles do not exceed fifty dollars in value. *Dean v. King*, 13 Ired., 20.

3. The act of 1844 includes under the terms "debts contracted" a bond given after the 1st July, 1845, though the consideration of the bond had existed before that time. *Ibid.*

4. Under the act of 1848, the insolvent debtor has a right to have allotments for his benefit made by the freeholders from

time to time, as his necessities may require, provided the allotments be made at intervals not unreasonably short. Each allotment must be complete in itself, so as to designate all the articles allowed. *Ibid.* (See Rev. Code, ch. 45, secs. 8 and 9, also act of 1856, ch. 2.)

5. The provision allowed insolvent debtors under the act of 1848, ch. 32, may lawfully be laid off to them after an issue of fraud is made up, and while it is still pending in court. *Schonwald v. Capps*, 3 Jones, 342. (See Rev. Code, ch. 45, secs. 8 and 9.)

6. A chose in action cannot be included by commissioners in their allotment of an insolvent debtor's provision, under the Revised Code, ch. 45, secs. 8 and 9. *Ballard v. Waller*, 7 Jones, 84.

7. If an article of property laid off to an insolvent housekeeper, under the Rev. Code, ch. 45, secs. 8 and 9, be exchanged for another article, the latter is not exempt from execution. *Lloyd v. Durham*, 1 Winst., 288.

8. It seems that the debtor might have procured the article received in exchange to be laid off to him by a second allotment, and then it would have been exempt. *Ibid.*

See (Insolvent Debtors—Proceedings under the act 1822 and subsequent acts, 66.) (Recordari, 14.)

IV. OF THE CREDITOR'S LIABILITY FOR THE MAINTENANCE OF HIS DEBTOR IN JAIL.

1. A creditor is not liable for the maintenance of his debtor in jail, unless he discharges the debtor, who is unable to pay for such maintenance. *Turrentine v. Murphy*, 1 Murph., 180. (See Rev. Code, ch. 59, sec. 5.)

2. Where a man has been arrested under a *ca. sa.*, and has given bond for his appearance at court, where an issue of fraud has been made up, and the issue continued from term to term; where his sureties have from time to time surrendered him; where the issue has been decided against him, and he has been committed to prison at the instance of the creditor; *it was held* that under the act, Rev. Stat., ch. 58, sec. 6, the creditor was responsible to the jailor for his fees, or allowance for the food furnished the prisoner, during the whole time he was confined in jail. *Veal v. Flake*, 10 Ired., 417. (See Rev. Code, ch. 59, sec. 5.)

3. When a debtor is committed to prison, and is permitted to take the prison bounds, the jailer is under no obligation to furnish him with provisions for a support, and, of course, the creditor cannot be compelled to re-imburse the jailor for any provisions which he may have so furnished. *Phillips v. Allen*, 13 Ired., 10.

4. Where a debtor, who is imprisoned at the instance of his creditor, has no property in the State, out of which the prison

fees and the charge for his support can be satisfied, notwithstanding he may have sufficient in another state, the jailor has a right to recover the amount from the creditor, under the Rev. Stat., ch. 58, sec. 6, making him responsible "if the prisoner be unable to discharge them." *Faucet v. Adams*, 13 Ired., 235. (See Rev. Code, ch. 59, sec. 5.)

V. THE CLAIM OF THE UNITED STATES AND THE STATE.

1. The act of Congress of March, 1797, gives to the United States a priority; 1st, where the debtor has become insolvent; 2nd, where the estate of a deceased debtor, in the hands of his executor or administrator, is insufficient to pay all his debts; 3rd, where the debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof; 4th, where the estate or effects of an absconding, concealed or absent debtor, shall be attached by process of law. *Young v. Tate*, 3 Murph., 498.

2. The act of July, 1798, makes the amount of debts due the United States a lien upon the real estate of the collector from the time suit shall be instituted for recovering the same; and provides that for want of goods and chattels the land shall be sold. This lien is qualified and conditional, and subjects the land to be sold only where the debtor has no personal estate. *Ibid.*

INSPECTORS OF ELECTIONS.

1. Inspectors of elections are, under the act of assembly, the exclusive judges of the qualifications of voters, and where no corruption is charged and found against them, they are not responsible in damages to a voter, whose vote is excluded on account of a mere error in judgment. *Peave v. Robbins*, 3 Jones, 339. (See Rev. Code, ch. 52, sec. 10.)

INSURANCE.

1. A provision in a policy of life insurance, excepting from liability the cases of death "by means of invasion, insurrection, riot or civil commotion, or of any military or usurped authority,

or by the hands of justice," does not embrace the case of a slave insured, who is killed in an armed and violent resistance to the authority of the patrol. *Spruill v. North Carolina Mutual Life Insurance Company*, 1 Jones, 126.

2. Where specific descriptions of the property insured are required by the terms of a fire insurance office, which are referred to and incorporated as part of the conditions of the policy of insurance, the suppression of an immaterial fact will not invalidate the policy. *Whitehurst v. Fayetteville Mutual Insurance Company*, 6 Jones, 352.

3. The failure of the person insured to repair a defect in the property, occurring *after* the contract was made, unless he be guilty of gross neglect, does not prevent the insured from recovering on the policy. *Ibid.*

4. Losses arising from *bona fide* efforts to extinguish fire, such as the wetting and soiling of goods, and losses by theft consequent on their removal, are fairly within the contract to insure against fire. *Ibid.*

5. Where, by a policy, the life of a slave was insured for five years absolutely, without requiring the payment of the annual installment, as a condition of the defendant's liability, *it was held* that the insurance money for a loss was not forfeited by a failure to pay such installment. *Woodfin v. Asheville Mutual Insurance Company*, 6 Jones, 558.

6. Where a party became a member of a mutual insurance company by taking out a policy, *it was held* that he thereby assented to, and became bound by, the by-laws then in force; and as one of these required that a particular account on oath of the circumstances of a loss should be given forthwith to the company, *it was held further* that no action could be sustained for such loss, without furnishing such account within a reasonable time, although this provision was not embodied in the policy. *Ibid.* S. P., *Boyle v. North Carolina Mutual Insurance Company*, 7 Jones, 373.

7. Where one of the by-laws of a mutual insurance company required that the insured, within thirty days after a loss by fire, should give notice to the company, specifying the amount of loss, the manner of it, and other particulars, as a condition to his right to recover; *it was held* that a declaration to the insured made by a travelling agent of the company, that "the matter would be all right with the company," was not a waiver of the necessity for such notice. *Boyle v. North Carolina Mutual Insurance Company*, 7 Jones, 373.

8. A requisition in a policy of insurance, that the person insured should "forthwith" give notice of a loss, to the company, is not complied with by giving notice at the expiration of twenty days. *Whitehurst v. North Carolina Mutual Insurance Company*, 7 Jones, 433.

INTEREST.

1. In an action for goods sold and delivered, interest should be allowed according to the custom of the state where the sale was made. *Kaighn v. Kennedy*, Mar., 37, (26.)

2. Whenever one person has the money of another, and knows what sum he ought to pay, he must pay interest for the same. *State v. Blount*, 1 Hay., 4, (7.) S. P., *Hunt v. Jucks*, *Ibid*, 173, (199.)

3. Interest must be calculated by the following rule: it must be estimated upon the principal from the time it commenced to the day of the first payment; if the payment were equal, and no more than equal, to the interest then due, it must extinguish the interest; if it exceeded the interest, the balance, after extinguishing the interest, must be deducted from the principal; if the payment were less than the interest, then the balance of interest must remain until the next payment; interest must then be calculated upon the principal remaining, to the time of the next payment, which next payment must be applied in the first place to the whole of the interest then due; and so *tolies quoties*. *Bunn v. Moore*, 1 Hay., 279, (323.) S. P., *Anonymous*, 2 Hay., 17, (169.) *North v. Mallett*, *Ibid*, 151, (329.)

4. Interest must be calculated according to the law of the place where the contract was made. *Anonymous*, 2 Hay., 5, (149.)

5. The plaintiff is entitled to interest upon his judgment if he institute a new action upon it; but not if he revive it by a *sci. fa.* *Anonymous*, 2 Hay., 26, (182.) (Interest is now given by Rev. Code, ch. 31, sec. 90.)

6. A promissory note to pay at the end of seven years from date, without interest, will bear interest after seven years. *McKinley v. Blackledge*, 2 Hay., 28, (185.)

7. Where a note is payable on demand, interest does not accrue until a demand is made; when no time is appointed, the money is payable immediately, without a demand, and interest accrues immediately. *Lewis v. Lewis*, 2 Hay., 32, (191.) S. P. *Freeland v. Edwards*, *Ibid*, 49, (207.)

8. British creditors were not entitled to interest on their debts after the Revolution until a demand after the treaty of peace. *Anonymous*, 2 Hay., 103, (263.)

9. When notes are received by a creditor, as a payment, the debtor should be credited for them at the time of the receipt, to be applied in the first place to the interest and then to the principal as other payments; otherwise when the creditor makes them his own only by delay. *North v. Mallett*, 2 Hay., 151, (329.)

10. If it be the rule of a merchant to charge interest on goods sold from three months after the sale, interest should be given accordingly. *Williams v. Ferebee*, 2 Hay., 392, (589.)

11. Interest will continue to accrue on a debt, if the creditor were in the country when it became due, although he be afterwards absent without leaving an agent. *Cornell v. King*, Conf. Rep., 446, (505.)

12. A debtor, who is ready to pay his debt when it becomes due, is excused from paying interest thereon, if the creditor conceal his place of residence, and the debtor know not where to apply to make payment. *Child v. Devereux*, 1 Murph., 398.

13. It was the design of the act of 1807, to allow a plaintiff interest on the principal sum recovered, from the rendition of the judgment; and where the whole sum is assessed in damages, the jury must distinguish between principal and interest; but where the principal and interest are discriminated on the record, or it can be collected from the record what the principal is, interest shall be calculated on that. *Deloach v. Worke*, 3 Hawks., 36.

14. A note payable one day after date, with an endorsement thereon that it was not to be paid until the death of the maker, bears interest from the time it became due, without reference to the endorsement. *Powell v. Guy*, 3 Dev. and Bat., 70.

15. When claims are put into the hands of an officer for collection, and he refuses or neglects to account for them, he is justly chargeable, not only for the principal sums, but also with interest from the time the claims began to bear interest. *State v. Allen*, 5 Ired., 36.

16. The rule, as to interest payable on debts, is regulated by the law of the country in which the contract is made, the law presuming that the contract is to be executed there, unless the parties stipulate otherwise; and this stipulation, to take the case out of the general rule, must appear on the face of the contract. *Arrington v. Gee*, 5 Ired., 590.

17. A bond, taken simply to secure the performance of a contract, wherever it may be executed, must bear the same interest as the original contract, unless it be otherwise expressed on the face of the bond. Hence, where A, a citizen of North-Carolina, took a number of slaves to Alabama, and there sold them to B, a citizen of Alabama, who was to give him a bond with security for the price of the slaves, and this bond was executed by B, in Alabama, where it bore date, and was afterwards brought to this state, where it was executed by two sureties, citizens of this state, the bond not expressing any place of payment, *it was held* that the sureties, as well as the principal, were bound for the payment of interest according to the laws of Alabama. *Ibid.*

18. Where the contract for the loan of money is made in Georgia, it will bear Georgia interest, though the note taken for the amount lent be made in this state. *Davis v. Coleman*, 7 Ired., 424.

19. An execution cannot require the collection of interest, when the judgment upon which it is issued does not give it. *Collais v. McLeod*, 8 Ired., 221.

20. When A, a citizen of Georgia, being in this State, offered to lend B \$6,000, but on his return to Georgia, not having sold his cotton crop, wrote to B that he could only lend \$3,000, whereupon B went to Georgia, there received the money and executed his note for the amount, *it was held* that B was bound to pay eight per cent., the interest according to the laws of Georgia. *Davis v. Coleman*, 11 Ired., 303.

21. A party, who sues for stipulated damages, is not entitled to interest, even from the date of his writ. *Devereux v. Burgwyn*, 11 Ired., 490.

22. In England, the rule is that interest is to be allowed, where there has been an express promise to pay interest, or where such promise is to be *implied* from the usage of trade, or other circumstances; but for goods sold, money lent, money paid, work and labor done, or on a guarantee, interest is not allowed, unless there be an express or implied agreement. Our decisions have extended the rule, and for money lent, or money paid, or had and received, or due on an account stated, the jury ought to be instructed to allow interest, the promise to pay being implied from the nature of the transaction. And in trover and trespass *de bonis asportatis* the jury may, in their discretion, allow interest upon the value, from the time of the conversion or seizure, as a part of the damages, so as to compel the wrongdoer to make full compensation, by charging him with the price as at a cash sale. *Ibid.*

23. Where there is a penal bond for the payment of money, interest may be recovered upon the sum really due, up to the time of payment, even after judgment. But if the condition be for the performance of some collateral act, as to execute a mortgage or deed of trust, as additional security for payment of money, interest cannot be recovered on a *sci. fa.* upon the damages assessed. *Trice v. Turrentine*, 13 Ired., 212.

24. Interest, being an incident to a bond for the payment of money, cannot be recovered in a separate action for it alone, after the principal of the bond has been paid. *Moore v. Fuller*, 2 Jones, 205.

25. Where a person has money in his hands as agent, and when it is demanded of him denies his obligation to pay, he is responsible for interest from that time, but not for any previous time. *Hyman v. Gray*, 4 Jones, 155.

See (Heirs, 7.) (Judgment—Of irregular, void and erroneous judgments, 27.) (*Lex loci*, 10–18.) (Sheriff—Liability for escapes, 20.)

JOINT OBLIGATIONS.

1. A firm in Maryland gave its promissory note to A, signed in the name of the firm, and A sued one of the partners alone,

relying on the act of 1789, (Rev. Code, ch. 31, sec. 84,) and it was held that he might sustain the action, as that act did not affect the contract, but only extended the remedy. *Palyart v. Goulding*, 2 Mar., 78, (133.)

2. Under the act of 1789 (Rev. Code, ch. 31, sec. 84,) the action may be brought against both the survivor and the administrator of a deceased joint obligor. *Brown v. Clary*, 1 Hay., 107, (125.) S. P., *Davis v. Wilkinson*, *Ibid*, 334, (383.)

3. Whether, if two be sued on a joint bond and the suit be abated as to one, judgment may be rendered against the other, *quære*. *Anonymous*, 1 Hay., 487, (561.)

4. The word "debts" in the act of 1789, relating to joint obligations, includes judgments; therefore, the remedy upon a judgment against several will survive against the personal representatives of each. *Smith v. Fagan*, 2 Dev., 298.

5. An action may be sustained, under the act of assembly, against any one or more of the joint obligors in a covenant of warranty, contained in a deed for the conveyance of land, for breach of such covenant, the act not being confined to the payment of money merely. *Grier v. Fletcher*, 1 Ired., 417.

6. All contracts are several, although made by partners. *Nesbitt v. Childs*, 10 Ired., 195.

JOINT TENANTS.

1. A widow and her two children were joint tenants of a slave. By the marriage of the widow her joint tenancy was severed, as was that between the children, by the act of 1784. (See Rev. Code, ch. 43, sec. 2.) And in a suit in trover by one of the children he was allowed to recover only one-third part of the value. *Witherington v. Williams*, Tay., 134, (83,) S. C. 2 Hay., 64, (232.)

2. Joint owners of a chattel have equal right to the possession of it; and, therefore, the exclusive possession of the chattel by one will not entitle the other to maintain trover against him for it. *Cole v. Terry*, 2 Dev. and Bat, 252.

3. Where there are two part owners of a chattel, and one of them, without the assent of the other, *destroys* the chattel or renders it *useless by use*, the former is liable to the latter in trover for the value of his share; and in such case no demand is necessary before bringing the action. *Guyther v. Pettijohn*, 6 Ired., 388.

4. Where a joint owner of personal chattels, who is authorized to sell them, warrants the soundness, as he has a right to

do, and they turn out to be defective, and the seller pays for the defect without suit, he may sue another joint owner for contribution according to his interest. *Davis v. Burnett*, 4 Jones, 71.

5. If one joint owner of a crop sells to the other his share of it, to pay a debt he owed him, and it is divided in the presence of both, for the purpose of ascertaining the amount to be credited on the debt, the title passes to the purchaser, whether the agreement for the sale was made *before* or *after* the division of the crop. *Warbritor v. Savage*, 4 Jones, 382.

JUDGE'S CHARGE.

See (Practice—Judge's Charge.)

JUDGMENT.

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|---|--|
| I. Of the effect of a judgment. | IV. Of the satisfaction of judgments. |
| II. How a judgment is proved, and of
a <i>scire facias</i> to revive it. | V. Of judgments against executors, administrators and heirs. |
| III. Of the assignment of judgments. | VI. Of irregular, void and erroneous judgments. |

I. OF THE EFFECT OF A JUDGMENT.

1. A judgment by default upon a bond payable in tobacco is not a final judgment. *Bell v. Hill*, 1 Hay., 72, (85.)

2. A judgment binds lands from the time it is pronounced, but it is in this wise only; it hinders the debtor from disposing of the land himself; but if a *fi. fa.* issues upon a subsequent judgment and comes to the hands of the sheriff, the title of the vendee under such execution is good. *Ibid.*

3. As between creditor and creditor, it is not the first judgment, but the first execution that gives the preference. *Ibid.*

4. Every judgment in a court of competent jurisdiction is to be presumed fair, until the contrary is proved, and the evidence to impeach it must be strong and convincing. *Wetber v. Sylva*, 2 Hay., 135, (303.)

5. It is only where the question between the parties has once been decided upon confession or verdict, that the judgment can

be pleaded in bar of another action. *Benton v. Duffey*, Con. Rep., 98, (229.)

6. A person is not bound by a judgment to which he is neither party nor privy. *Williamson v. Smart*, Conf. Rep., 146, (268.)

7. A judgment obtained in one state is not conclusive between the parties when sued upon in another. *Peck v. Williamson*, 1 Car. L. R., 53, (9.) *Quere!*

8. An order of the county court for the sale of land, after a constable's levy on it accompanied with a return of no chattels, is not a judgment, though it may have the quality of one in attaching a lien upon the land. *Bowen v. Lanier*, N. C. Term, R., 241, (673.) (The plaintiff in such a case may now have a judgment entered in court. See Rev. Code, ch. 45, sec. 8 and 9.)

9. A judgment creates no lien upon land when a *fi. fa.* is sued out. It is so upon a moiety of the land of which the debtor was seized at the time of its rendition, if the creditor sue out an *elegit*; but if he elect to sue out a *fi. fa.*, the lands are bound only as chattels. *Jones v. Edmunds*, 3 Murph., 43. (The stat. of West. 2nd, which gave the writ of *elegit*, was re-enacted in the Rev. Stat., ch. 45, sec. 3, but is omitted in the Rev. Code. See ch. 45.)

10. After a judgment in favor of A, but before he sued out execution (or the *teste* of the execution) the debtor conveyed his lands in trust to secure a debt which he owed to B, *it was held* that the debt to B must be satisfied before the execution. *Ibid.*

11. A state court cannot, upon a record of the circuit court of the United States offered in evidence, inquire into the fact, whether the judgment of the circuit court was regularly entered up, or whether the subsequent proceedings thereon were regular. *Pigot v. Davis*, 3 Hawks, 25.

12. The judgment of discharge of a court of exclusive jurisdiction, on the petition of an insolvent, until reversed for error or quashed, is conclusive evidence of the discharge, and its regularity cannot be questioned incidentally. *Jordan v. James*, 3 Hawks, 110.

13. After a judgment by default has been set aside, another court cannot enquire collaterally, whether it was set aside properly or not. *Bender v. Askew*, 3 Dev., 149.

14. In this state, when no judgment is formally entered on a verdict, which, connected with the pleadings, authorizes a judgment, the court is bound to intend such a judgment as ought to have been rendered. *Barnard v. Etheridge*, 4 Dev. 295.

15. Judgments of a court of record, on whatever day of the term they may be rendered in law, relate to, and are considered judgments of, the first day of the term; and this rule applies, although the judgments were confessed upon writs which were noted by the clerk to have been issued, and the service of which

was acknowledged, on a day subsequent to the first day of the term; and executions issued upon such last mentioned judgments will have priority over a deed in trust, proved and registered on the second day of the same term. *Harley v. Lea*, 4 Dev. and Bat., 169.

16. A judgment by confession is valid without any previous process. *Ibid.*

17. Where a testator died in term time, before a judgment was signed, *it was held* that it might be signed after, and execution taken out against his goods in the hands of his executor, *tested* the first day of the term, for they relate to, and are considered as a judgment and execution of, the first day of the term, at which day the testator was alive. *Ibid.*

18. A person may confess a judgment, or recognizance on record, to the State for a sum of money, as well as to an individual. Therefore, where A was convicted on an indictment and fined, and ordered into the custody of the sheriff, and B, in consideration that A should be discharged from custody, confessed a judgment to the State for the fine and costs, *it was held* that the judgment could not afterwards be set aside. *State v. Lane*, 1 Ired., 264.

19. An entry in a suit, "dismissed at the costs of the defendant," is not to be construed as a *retraxit*, or a judgment upon the merits, so as to bar another action for the same cause. It is simply a judgment of discontinuance, where the court erred in ordering the defendant to pay the costs, or where such order was made by the consent of the parties. *Bond v. McNider*, 3 Ired., 440.

20. No judgment, but one on a *retraxit* or on the merits, will bar a subsequent action. *Ibid.*

21. Although a warrant may have been filled up by a constable after the magistrate signed it, and this may be improper, yet the judgment regularly rendered thereon cannot, if at all, be collaterally impeached, as being void, for such defect in the leading process. *Hafner v. Irwin*, 4 Ired., 529.

22. A judgment of dismissal is a proceeding unknown in courts of common law jurisdiction. *Morgan v. Allen*, 5 Ired., 156.

23. A judgment or decree pronounced in any state, against an inhabitant of another state, upon whom process in the suit has not been served, is only binding in the state in which such judgment or decree has been rendered. *Davidson v. Sharpe*, 6 Ired., 14.

24. Where an award has been made by referees under a rule of court, and confirmed by the court, it is binding on all parties, and while it remains unreversed the judgment cannot be contradicted. *Anders v. Anders*, 9 Ired., 214.

25. Where a judgment is confessed upon terms which are duly entered, it is in effect a conditional judgment, and the

court will take notice of the terms and enforce them. *Wood v. Bagley*, 12 Ired., 83.

26. The entry of "compromised" in a suit, does not, *ex vi termini*, import that it was settled and decided, and a judgment given on its merits, but it is open to extrinsic proof as to what was the full agreement of the parties in relation thereto. *Idding v. Hiatt*, 6 Jones, 402.

27. A judgment in favor of "Lash & Moore," trading as a firm, is valid, and is admissible in evidence in a suit brought on it by the members of the firm in their individual names set out in full, and adding that they were trading under the name and style of "Lash & Moore." *Lash v. Arnold*, 8 Jones, 206.

See (Interest, 13.) (Joint Obligations, 4.)

II. HOW A JUDGMENT IS PROVED, AND A *SCI. FA.* TO REVIVE ONE.

1. The only legal proof of a judgment, is by the production of the formal entry of it, but minutes made during the progress of a cause, if received without objection to their form, are sufficient proof of the judgment, if from them a formal entry can be made up. *Gibson v. Partee*, 2 Dev. and Bat., 530.

2. Matter, which might have been well pleaded to the original action, cannot be heard as a defence to a *sci. fa.* brought to revive the judgment rendered in that action. *Ferebee v. Doxey*, 6 Ired., 448.

3. To support the declaration in an action of debt on a judgment, the exemplification of the judgment itself must be produced, it is not sufficient to show a *sci. fa.* to show cause why execution on the judgment should not issue, and an award of execution according to the *sci. fa.* *Fitch v. Porter*, 8 Ired., 511.

4. Where there is a dormant judgment, the plaintiff may have a *sci. fa.* to revive, and an action of debt to recover the amount of the judgment, both pending at the same time, and a judgment on the *sci. fa.* cannot be pleaded in bar of the action of debt. *Carter v. Colman*, 12 Ired., 274.

See (Interest 5-13.) (Set off, 7.)

III. OF THE ASSIGNMENT OF JUDGMENTS.

1. A judgment, strictly speaking, is not negotiable, yet it may be *de facto* assigned, and the law will so far take notice of the assignment, as to protect it against the act of the assignor. *Smith v. Powell*, 1 Hay., 452, (520,) S. P., *McDaniel v. Tate*, *Ibid*, in the note.

2. Where A pays to the sheriff the amount of an execution in his hands, against C, in favor of B, if B afterwards assign his interest in the judgment to A, such payment shall be deemed a purchase, and not a satisfaction of B's claim. *Carter v. Sheriff of Halifax*, 1 Hawks., 483.

3. Money advanced by a stranger for the purchase of a judgment is not a satisfaction of it, and the assignee has a right to receive the money thereon, and in case of the default of the sheriff, to maintain an action against him in the name of the assignor. *Governor v. Griffin*, 2 Dev., 352, S. P. *Foster v. Frost*, 4 Dev., 424.

4. An assignment of a judgment to one of the parties against whom it has been obtained is a satisfaction; and if it were intended to have been kept on foot, it ought to have been assigned to a stranger to the judgment. *Sherwood v. Collier*, 3 Dev., 380.

5. An assignment of a judgment is utterly void at law, and cannot be noticed in a court of law. *Ferebee v. Doxey*, 6 Ired., 446.

6. Where money was paid to the plaintiff in an execution by a surety, on an understanding that the judgment was to be assigned to a third person, for the benefit of the surety, and such assignment was afterwards made, it was held that this was not a payment of the judgment, but that it might be enforced against the principal, in the name of the plaintiff, for the benefit of the surety. *Barringer v. Boyden*, 7 Jones, 187.

See (Judgment—Of the satisfaction of judgments, 10.)

IV. OF THE SATISFACTION OF JUDGMENTS.

1. The return of *satisfaction* to a *fi. fa.* issuing on a judgment, is conclusive upon a *sci. fa.* to revive such judgment; and the only way in which such return can be got rid of, is by an application to the court to amend it. *Snead v. Rhodes*, 2 Dev. and Bat., 386.

2. A judgment confessed to a married woman, as if she were single, comes within the operation of the act of 1826, prescribing the time within which the presumption of payment or satisfaction on judgments shall arise, notwithstanding the coverture, and although the *sci. fa.* to revive the judgment is sued out in the name of the husband and wife. *Johnson v. England*, 4 Dev. and Bat., 70. (See Rev. Code, ch. 65, sec. 18.)

3. The entry of satisfaction of a judgment on the record is evidence to a jury, from which they may infer that the judgment has been paid; but, *per se*, it only imports a release of the judgment, and it may be shown by extrinsic evidence that the judgment was not in fact paid. *Reynolds v. Magness*, 2 Ired., 26.

4. The commissioners of Newbern recovered a judgment against the sheriff and his sureties for the amount of the taxes due to the town, which he had collected and failed to pay over. Afterwards one of the sureties had the money paid and an assignment of the judgment made to a third person, by the attorney of the commissioners, which was afterwards ratified by the commis-

sioners, and a receipt was given by the treasurer of the board to the sheriff, to enable him to renew his bonds. *It was held*, first, that the payment of the money, and the assignment to a third person of the judgment, did not amount in law to a payment and satisfaction of the judgment, as against the defendants therein; and, secondly, that, although the receipt may have operated as a fraud upon the court, yet it was not conclusive as to the fact of payment by the defendants in the judgment, but might be explained. *Commissioners of Newbern v. Dawson*, 10 Ired., 436.

5. Under the act of 1826, the presumption of the payment or satisfaction of a judgment does not arise until ten years after the plaintiff has ceased to prosecute his judgment, that is, until ten years after the day of the return of his last execution. *Butts v. Patton*, 11 Ired., 262. (See Rev. Code, ch. 65, sec. 18.)

6. Where A, a defendant in an execution, placed funds in the hands of the sheriff for the satisfaction of the execution, and the sheriff entered on it "satisfied," but before he made his return another arrangement was made between him and A, and the funds were withdrawn and applied by A to another purpose, upon which the sheriff struck out the entry of satisfaction, *it was held* that when sued upon the judgment on which this execution issued, A could not avail himself of this arrangement with the sheriff in support of a plea of payment, and that the plaintiff, though he might proceed against the sheriff, yet had not lost his remedy upon the judgment. *Tarkinton v. Guyther*, 13 Ired., 100.

7. Where, in reply to the alleged presumption of the payment of a judgment arising from the lapse of eleven years, it was proved that for seven years of that time the defendant was totally insolvent, but for the last four years of it, he was able to pay, *it was held* that the presumption was repelled. *Woodbury v. Taylor*, 3 Jones, 504.

8. What will repel the presumption of payment, arising from the lapse of time, is a question of law, which it is error in the court to submit to the jury, though should the jury decide the question correctly, it would prevent the awarding of a *venire de novo*. *Ibid*.

9. One joint principal, who pays the amount of a judgment against him and the other principal, has no equity to be subrogated to the rights of the creditor; so that satisfaction of the judgment made by him cannot be regarded otherwise than as a payment. *Lowe v. Felton*, 7 Jones, 216.

10. The parol assignment of a judgment constitutes the assignee an agent for the plaintiff to receive payment, and a payment to him will discharge the judgment. *Bartlett v. Yates*, 7 Jones, 615.

See (Evidence—Presumption, 6.) (Set-off, 7.) (Sheriff—Lia-

bility as bail, 8.) (Sheriff—When the defendant in the process is sheriff, and of successive sheriffs, 7.) (Surety and Principal, 6-7-22.)

V. OF JUDGMENTS AGAINST EXECUTORS, ADMINISTRATORS AND HEIRS.

1. In a *sci. fa.* against heirs to subject the lands of the deceased to his creditors, the proper judgment is against lands descended in their hands, although they do not point out such lands. *Spaight v. Wade*, 2 Murph., 295, S. C. 1 Car. L. R. 285, (29.)

2. Where, upon a petition in the county court by the next of kin against the administrator and one of the next of kin (who was alleged to have been fully advanced) for a settlement and distribution of the estate, and which was subsequently taken to the superior court by a writ of *certiorari*, and in that court the suit by the petitioners was settled and disposed of, and by consent it was referred to arbitrator to determine whether the other next of kin had been fully advanced, and they returned an award in his favor, upon which the administrator permitted, without objection, a judgment to be entered against him for the amount; *it was held* that the judgment was in effect a confession of a judgment by the administrator in favor of his co-defendant, and was substantially just, though he was a defendant instead of being a petitioner; and as a *sci. fa.* had been issued on the judgment, the executors of the administrator, who had died, might enter any substantial plea to protect them in their representative character. *Dozier v. Simmons*, 4 Hawks, 26.

3. If it appear upon the whole record, that the demand of the plaintiff is against the defendant in his representative character, a judgment against the latter personally will be reversed as erroneous. *Shearin v. Neville*, 1 Dev. and Bat., 3.

4. Where, on a warrant against an administrator for debt, the justice, before whom it was returned, made the following entry, "judgment confessed to the officer by the administrator for the sum of, &c.," which the justice signed, *it was held* that this was a valid judgment against the administrator. *Hooks v. Moses*, 8 Ired., 88.

5. In an action on a justice's judgment against an administrator, the defendant cannot plead *plene administravit*, being fixed with assets by the judgment. *Ibid.*

See (Judgment—Of irregular, void and erroneous judgments, 37-38.)

VI. IRREGULAR, VOID AND ERRONEOUS JUDGMENTS.

1. In a writ of false judgment brought to reverse the judgment of a justice, and a *sci. fa.* to the defendant to come in and show cause against it, he did not appear, and the court, finding

the matters assigned for error were matters of fact, reversed the judgment. *Anonymous*, 1 Hay., 398, (458.)

2. Reasons in arrest of judgment cannot be filed, without permission of the court on hearing the reasons. *Quære. Long v. Baker*, 2 Hay., 128, (291.)

3. The superior court cannot reverse one of its judgments for error in a matter of law; but if it be absolutely void, or taken irregularly against the known rules of the court, it may be set aside at any time, on motion. *Anonymous*, 2 Hay., 73, (240.) S. C. Tay., 146, (91.) S. P. *Devang v. —*, 2 Hay., 239, (424.)

4. A judgment confessed in vocation, and then entered on record by consent as of the preceding term, is void, and cannot be made valid by any subsequent act of the defendant. *Slocumb v. Anderson*, 1 Car. L. R., 466, (77.)

5. A judgment confessed before the clerk, when there is no court, is irregular, and will be set aside on motion. The rendition of a judgment is a judicial act, to be done only by a court. *Matthews v. Moore*, 2 Murph. 181.

6. A judgment given by a justice of the peace, from which an appeal has been prayed and granted, remains no longer a judgment, and cannot be sued on as such. *Marshall v. Lester*, 2 Murph., 227, S. C. 1 Car. L. R., 100, (13.)

7. Where, to *sci. fa.* against defendant as bail, he pleaded certain pleas, and judgment was rendered against him, but, upon appeal to the superior court, it did not appear on the record how the pleas had been disposed of, a judgment of that court against the defendant was held to be erroneous. *Nesbitt v. Ballew*, 3 Hawks, 57.

8. A judgment against the defendant named in the writ, but not made a party, either by service, public notice, or attaching his estate, is merely void, and should be disregarded when produced, on *nil tiel record*. *Armstrong v. Harshaw*, 1 Dev., 187.

9. A judgment *nunc pro tunc* is not erroneous, although it appears that it should have been as of the prest term. *Arrington v. Bass*, 3 Dev., 95.

10. Judgments by default, signed by the attorney, without an actual adjudication by the court, may be set aside at any time, even after the term at which they are entered. *Bender v. Askew*, 3 Dev., 149.

11. A judgment by *nil dicit*, against an infant heir, is not void, but only erroneous. *Ibid.* S. P. *White v. Albertson*, 3 Dev., 241.

12. Where a judgment was rendered against an infant heir, upon process issuing against his guardian, who appeared for the infant, this appearance, although irregular, is taken to have been sanctioned by the court. *White v. Albertson*, 3 Dev., 341.

13. A judgment is void, when rendered contrary to the course of the court, but if improperly rendered against a party, when it should have been in his favour, it is only erroneous. *Ibid.*

14. A judgment cannot be collaterally impeached for error if rendered according to the course of the court, it being valid until reversed, however erroneous it may be. *Ibid.* S. P., *Williams v. Woodhouse*, 3 Dev., 257.

15. The superior court may, by writ of error, reverse the judgments of a county court, but cannot in any way quash them, or supersede them as nullities. *Swaim v. Fentress*, 4 Dev., 601.

16. An irregular judgment does not justify the plaintiff in any of the acts done under it, provided it be set aside, although it does the officer; and a stranger gets a good title, even if it be set aside. It is the same as to the party when set aside as if it had never been. *Skinner v. Moore*, 2 Dev. and Bat., 138.

17. A judgment is not irregular because it is erroneous. Error does not constitute irregularity, nor does it necessarily enter into it. An irregular judgment is one entered contrary to the course, the practice, of the court, as out of term time, &c. If it appear upon the record entirely free from error, yet the court by which it purports to have been pronounced may set it aside for the irregularity; but no other court can, except in an appellate capacity. *Ibid.*

18. The principle that the judgment of a court of record is conclusive, until it is set aside or reversed, applies to all courts to which a writ of error runs from a higher court, or from which an appeal lies to a higher court, which proceeds according to the course of the common law, because those are adequate remedies for any error. As to inferior tribunals, or those having a special or peculiar jurisdiction, it is otherwise. Their improper acts may, in some instances, be restrained in their progress by prohibitory writs from a court of general superintending powers; or, in others, may be corrected by having their proceedings brought up by *certiorari* and quashed; and in yet others may be questioned by plea. *Ibid.*

19. It seems to be a necessary function of every court, and particularly of a court of the highest jurisdiction to which no writ of error lies, as our superior courts, to set aside an irregular judgment, that is, one rendered contrary to the course and practice of the court, at a subsequent term, provided application for that purpose be made in proper time. *Winslow v. Anderson*, 3 Dev. and Bat., 9.

20. In general, judgments taken without service of process, signed out of term, or by default before the proper period of the term, are irregular. *Ibid.*

21. If a judgment by default, interlocutory or final, be signed according to the course of the court, then it is the judge's judgment, because it is entered according to his directions. And although the former is always under the control of the court, yet, from its nature, the court ought not to interfere with the

latter, that is, a final judgment, after the term at which it is taken. *Ibid.*

22. Until set aside, an irregular judgment must in general be regarded as a subsisting and regular judgment, as to all the world. *Ibid.*

23. An entry, upon the rendition of a verdict in favor of the plaintiff, that "the defendant is entitled to a credit to be ascertained by M. F. and J. H. S., and the clerk is then authorized to enter a *remittitur*, judgment of the court accordingly and for costs," is not a judgment *then* rendered, but an agreement for a judgment to be rendered subsequently upon the ascertainment, by the referees, of the credit to which the defendant is entitled. *Downs v. Batchelor*, 3 Dev. and Bat., 52.

24. A judgment, regularly entered at one term of a court, cannot be set aside by the court at a subsequent term. *Ibid.*

25. Upon a conviction for a criminal offence, it is irregular to annex to the sentence any condition for its subsequent remission. A judgment, though pronounced by the judge, is not his sentence, but the sentence of the law. It is the certain and final conclusion of the law following upon ascertained premises, and must, therefore, be unconditional. *State v. Bennett*, 4 Dev. and Bat., 43.

26. In cases where the law gives to the judges a discretion over the *quantum* of punishment, they may, with propriety, suspend the sentence for the avowed purpose of affording to the convicted an opportunity to make restitution to the person peculiarly aggrieved by his offence, or to redress its mischievous public consequences, and when judgment is to be pronounced, the use which has been made of such opportunity is very proper to be considered by the court in the exercise of that discretion. *Ibid.*

27. It is only in actions brought *upon contracts*, that the court can render judgment for interest on the amount found by the jury. In other cases such a judgment is erroneous. *Satterwhite v. Carson*, 3 Ired., 549.

28. Though there be but one judgment in the superior court, yet where it consists of several distinct and independent parts, it may be reversed in the supreme court as to the part wherein it is erroneous, and affirmed for the remainder. *Ibid.*

29. A joint judgment was obtained before a justice against A and B, from which A appealed to the county court, and gave C as surety for the appeal; and at the June term, 1843, judgment was entered against B, and against C the surety, both A and B having appeared and pleaded in the county court. This judgment was on motion at December term, 1843, vacated; and the plaintiff appealed from the order to the superior court, which court dismissed the appeal, on the ground that there was no error in the judgment of the county court at the December term

1843, *it was held*, 1st, that the appeal from the justice took up all the proceedings to the county court; for the judgment being joint, one half of it could not be vacated, and the other half left valid in the justice's court; secondly, that the county court had no power to reverse a judgment rendered at the preceding term. *Ramsour v. Roper*, 7 Ired., 346.

30. A judgment may be vacated at any time, on motion, in the same court in which it was rendered, upon parol proof that it was entered irregularly and not according to the course of the court; as, for instance, where the defendant in the cause was an infant, and no guardian had been appointed to represent his interest. *Keaton v. Banks*, 10 Ired., 381.

31. Where an action was brought in the name of J. Brooks, W. E. Colton and W. E. Churchill, partners trading under the name and firm of "Brooks, Colton & Co.," and the judgment was in the name of "Brooks, Colton & Co.," *it was held* that this was a variance for which, at common law, the judgment might have been reversed, but that the error was cured by our statute of amendments. *Brooks v. Ratcliff*, 11 Ired., 321. (See Rev. Code, ch. 3. sec. 5.)

32. Judgments taken without the intervention of the court, as of course, are from necessity always under the control of the court, whose judgments they purport to be, and of an appellate court which can treat the matter *de novo*. *Williams v. Beasley*, 13 Ired., 112.

33. A judgment against an infant, appearing by attorney, is valid, until reversed upon a writ of error. *Marshall v. Fisher*, 1 Jones, 111.

34. Mere office judgments, such as one taken *instantly* upon a bond for the appearance of an insolvent debtor, are under the control of the court, and may be modified or set aside, upon sufficient cause shown, at a succeeding term of the court. *Powell v. Jopling*, 2 Jones, 400.

35. A judgment exceeding the sum demanded in the writ is erroneous, but not void; and its validity cannot be questioned collaterally. *Savage v. Hussey*, 3 Jones, 149.

36. A judgment entered against a person who was not served with process, or in any way notified, and who did not appear, is void, and no suit can be brought on it. *Stallings v. Gully*, 3 Jones, 344.

37. Where a warrant has been brought against an administrator for the debt of his intestate, and the justice, before whom it is returned, renders a judgment against him in his individual capacity, it is error, for which a *recordari* in the nature of a writ of false judgment is a proper remedy. *Hare v. Parham*, 4 Jones, 412.

38. In a case like the above, the general rule is for the superior court simply to reverse the false judgment; but under the

provisions of the act of 1828, Rev. Code, ch. 46, secs. 34 and 35, relative to warrants against executors and administrators, the superior court should, besides reversing the false judgment, enter a judgment in favor of the plaintiff, ascertaining his debt, and then permit the defendant to make any defence he can by plea relative to the assets. *Ibid.*

39. A judgment rendered against the principal and surety in an insolvent debtor's bond, when both were absent from court on account of sickness, is not irregular and void, and cannot be vacated on motion. *Osborne v. Toomer*, 6 Jones, 440.

40. Clerks, during the term of the court, can only make short minutes, from which they must make out a more formal record afterwards, in vacation, and they are at liberty then to draw up all judgments and orders in proper form. *Ibid.*

See (Judgment—Of judgments against executors, administrators and heirs, 3.) (Trespass—To persons and personal property, when it will lie, 12.)

JURISDICTION.

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| I. Jurisdiction of justices of the peace. | III. Jurisdiction of the court of equity in selling infant's property. |
| II. Jurisdiction of the county and superior courts. | IV. Jurisdiction of the supreme court. |

I. OF JUSTICES OF THE PEACE.

See (Justices of the peace—Of their jurisdiction, judgment and execution.)

II. OF THE COUNTY AND SUPERIOR COURTS.

1. The consent or admissions of a party cannot give to a court jurisdiction of a subject matter, not conferred upon it by law. *State v. Roberts*, 1 Hay., 176, (201,) *S. P. Wagoner v. Grove*, Conf. Rep., 516, (563.)

2. In the superior court, under the act of 1777, if the sum recovered were less than £50, nonsuit should be entered. *McNiel v. West*, 2 Hay., 51, (211.)

3. Under the act which fixed the jurisdiction of the county courts at £20, the defendant should have pleaded that the sum due was less than £20 when the action was commenced, otherwise the court will not on motion, after a verdict for less than £20, set aside the verdict and enter a nonsuit. *Anonymous*, 2

Hay., 71, (238,) S. P. *Brooks v. Collins*, Tay., 236, (103,) S. C. Conf. Rep., 345, (425.)

4. The county court, under the £20 jurisdiction act, will not order a nonsuit, if the sum be reduced under £20 by a set off. Otherwise if by payment. *Anonymous*, 2 Hay., 115, (275.)

5. The legislature of the State cannot define and give our courts jurisdiction of crimes committed in another state or country. *State v. Knight*, Tay, 65, (44,) S. C., 2 Hay., 109, (267.)

6. If the nominal plaintiff reside out of the State, the defendant may be sued out of his own district, if the real plaintiff be an inhabitant of the district in which he sues. *Anonymous*, Tay., 150, (94.)

7. The civil divisions of the State into counties, &c., must be taken notice of judicially by the courts. *State v. Glasgow*, Conf. Rep., 38, (176.)

8. While the law was that all indictments for assaults, batteries, &c., should originate in the county courts, and an indictment was found in the superior court charging an assault with intent to murder, and the jury found the defendant guilty of a simple assault only, *it was held* that the superior court had jurisdiction. *State v. Campton*, Conf. Rep., 67, (200.)

9. Where an action is brought for the hire of a slave, and the jury assess damages at less than £30, the plaintiff must be nonsuited. *Williams v. Holcombe*, 1 Car. L. R., 365, (33.) (See Rev. Code, ch. 31, sec. 38.)

10. To a plea in abatement to the jurisdiction, that the plaintiff of record had not sued in his proper district, it is a good replication for the plaintiff, that the person having the beneficial interest in the suit resided in the proper district to give the court jurisdiction. *Bell v. Bell*, 1 Murph., 95.

11. The superior court of one county had no jurisdiction of offences committed in another county, although both belonged to the same judicial district. (This was before the act of 1806, by which the district system was abolished.) *State v. Patterson*, 1 Murph., 443.

12. A plea in abatement to the jurisdiction, "that the matter in contest" was not of the value of £50, in an action against defendant for negligently keeping his ferry, &c., cannot be sustained under the act of 1793, which mentioned "debt or demand," and not "the matter in contest" in an action *ex delicto*, in which it cannot be said before verdict what the damages will be. *McGehee v. Draughon*, 2 Car. L. R., 260, (240.)

13. The purchasers of the distributive shares of next of kin, for a valuable consideration, may proceed against the personal representatives of the deceased by petition in the county court, under the act of 1762, in their own names. And the next of kin, as well as the personal representatives, are precluded from disputing the valuable consideration acknowledged by the deed

to have been paid. *Wright v. Lowe*, 2 Murph., 354. (See Rev. Code, ch. 64, sec. 7.)

14. Objections to the jurisdiction of the superior courts must in general be pleaded in abatement; and they can be taken on the general issue only in cases where the action is in its nature local, as relating to the possession of land, or where a court has no jurisdiction at common law, or where no court of the State has jurisdiction, or where it has been taken away by statute, without prescribing the manner in which the objection shall be taken, and in cases of the like sort. *Green v. Mangum*, 3 Murph., 39.

15. A plea to the jurisdiction of the superior court, that the person then holding the term as a judge had not been constitutionally appointed, cannot be sustained, because it involves the absurdity of calling on a person to decide that he is not a judge, when he can make no decision at all unless he be a judge. *Beard v. Cameron*, 3 Murph., 181.

16. Some actions of a local nature, and some of a transitory kind, must be brought where the cause of action arose; but with these specified exceptions, no action can be brought in a county in which neither party resides. *Yadkin Navigation Company v. Benton*, 1 Hawks., 422.

17. Where a suit is commenced in the county court, and removed by *consent* into the superior court, such removal is good, provided the suit be one of which the superior court may entertain jurisdiction. *West v. Kittrell*, 1 Hawks., 493.

18. In debt on bond for less than \$100, since the act of 1820 increasing the jurisdiction of justices, advantage can be taken of the want of jurisdiction by plea in abatement only. *Sheppard v. Briggs*, 2 Hawks., 369. (The law is now altered; see Rev. Code, ch. 31, sec. 38.)

19. A general jurisdiction is not ousted except by plain words, or a necessary implication, and, notwithstanding the act giving a justice jurisdiction in cases where the debt and interest exceed one hundred dollars, and the act authorizing the court to dismiss a suit for less, yet, as there are no words in those acts ousting the jurisdiction of the superior courts in cases of one hundred dollars and interest, it remains. *Griffin v. Ing*, 3 Dev., 358. (See Rev. Code, ch. 31, sec. 38 and ch. 62, sec. 6.)

20. The agreement of parties cannot bestow on a court an authority to decide a case, on any other principles than those prescribed by law for its decision. *Fagan v. Jacobs*, 4 Dev., 263.

21. An action on a sheriff's bond, in the name of the State for the use of an injured party, may be brought in the superior court of the county in which the relator resides, though all the defendants reside in a different county. *State v. McGee*, 2 Ired., 209. (See Rev. Code, ch. 31, sec. 37.)

22. The superior court has jurisdiction of an action founded

on two notes amounting together, principal and interest, to one hundred dollars or more, but neither of which alone amounts to that sum. *McCasten v. Quinn*, 4 Ired., 43.

23. Under an act passed in 1842, establishing the county of Union, an indictment against citizens of Union, pending in Anson superior court at the fall term, 1843, should have been transferred to the superior court of Union though the place where the offence was committed was still in Anson. *State v. Hart*, 4 Ired., 222.

24. It must appear upon the records of every county court, that at least three justices were present to constitute and hold the court, as a less number is not competent to constitute a court. But if it appear that three justices opened the court, it will be intended that they continued to hold it notwithstanding the adjournment, unless others be specially named as being present on subsequent days of the term. *State v. King*, 5 Ired., 203.

25. In an action of assumpsit for goods sold and delivered, the damages were laid at \$200, and the evidence in support of it was an instrument in the following words: "Received 1500 (hundred) weight of bacon at 6 cents, and 128 lbs. of lard—Wm. Taber;" and the back was endorsed "credit \$36." The jury found a verdict for \$76; and it was held that the instrument was neither a promissory note nor a liquidated account, and therefore the case did not come within the act of 1826, which prohibited the courts from taking jurisdiction of any sum less than \$100 due by bond, note or liquidated account; and if this were not so, yet the court could not dismiss the suit on motion, as the action was commenced for more than \$100, which would make a plea in abatement the proper remedy. *Newman v. Tabor*, 5 Ired., 231. (See Rev. Code, ch. 31, sec. 38.)

26. The State can bring an action in the superior court, on a bond payable to herself, for a less sum than one hundred dollars; for general statutes do not bind the sovereign unless expressly mentioned in them. *State v. Garland*, 7 Ired., 48.

27. A plaintiff in an action of assumpsit cannot be nonsuited, though the verdict of the jury is for less than \$60, if he file an affidavit in the words of the act "that the sum for which his suit is brought, (being over \$60,) is really due, but for want of proof he cannot make recovery." *Brookshire v. Brookshire*, 8 Ired., 74. (See Rev. Code, ch. 31, secs. 37 and 38, which do not continue the provision contained in the 42d section of the 31st chapter of the Rev. Stat., but substitute a plea in abatement instead of it.)

28. Where a court consists of more than two members, a majority is competent to do all the business, which the court can do where all the members are present, unless the legislature otherwise direct. *State v. Woodside*, 8 Ired., 104.

29. Where the principal sum in a promissory note is under one

hundred dollars, but the interest accrued makes the whole sum due on the note upwards of one hundred dollars, the county court has jurisdiction of a suit brought on it. *Birch v. Howell*, 8 Ired., 468. (See Rev. Code, ch. 31, sec. 38.)

30. Under the acts establishing the county of Polk, connected with the general act on the subject of jurisdiction, a citizen of the county of Polk has no right to institute a suit in the superior court of Rutherford county against another citizen of Polk, and on plea, such a suit must be dismissed. *Allen v. Mills*, 8 Ired., 473.

31. Notwithstanding the act of 1844, ch. 12, declares that there shall be no jury trials in the county court of Buncombe, yet that county court still retains its original jurisdiction in bastardy cases, and if the defendant tender an issue, the case must be removed to the superior court by *certiorari*, that the issue may be there tried. *State v. Sluder*, 8 Ired., 487.

32. The provisions of the 42d section of 31st chapter of the Revised Statutes apply to suits in the superior court of Cleveland county, removed, under the private acts of 1844 and 1846, from the county to the superior court of that county. *Parham v. Hardin*, 11 Ired., 219. (See Rev. Code, ch. 31, sec. 37.)

33. Under the act of 1848, relating to the county of Polk, all the records transferred to the superior court of Polk from the county of Rutherford are directed to be returned to the superior court of Rutherford county, the act of 1846 establishing the superior courts of Polk having been repealed by the act of 1848, and *it was held* that the superior court of Rutherford had the power to issue an execution on a judgment, rendered in the county of Polk while it had jurisdiction, as to cases from the former county, removed by the act of 1846, and re-transferred by the act of 1848. *Matthews v. Gilreath*, 11 Ired., 244.

34. Where a petition had been filed in the county court by the next of kin of an intestate for the sale of negroes, for the purpose of distribution, and a sale had been made by a commissioner appointed by the court, according to the prayer of the petitioners, and he had paid over to them what he alleged to be their full respective shares, it is not competent for the petitioners to file a subsequent original petition in the same court, charging that the commissioner had not paid them their full shares, (they having signed a receipt in full by mistake,) and requiring the commissioner to account, &c., and to pay over the balance, &c. Their relief could only be obtained by an application to the county court for a rehearing, if the proceeding of the commissioner had been confirmed, or by recourse to a court of equity to set aside the receipt, if given through a mistake. *Reid v. Pass*, 11 Ired., 589.

35. When it appears from the record, that a cause was tried at a special term of the superior court, it is to be presumed,

prima facie, that an order for holding it was duly made, and that it was duly held. *Sparkman v. Daughtry*, 13 Ired., 168.

36. The true meaning and import of the act, Rev. Stat., ch. 31, secs. 40 and 42, are that if the jury shall find a less sum than \$60 to be due to the plaintiff, he shall not be nonsuited, if he shall show by affidavit that the sum, for which the suit is brought, is really due, "but for want of proof, or that the time limited for the recovery of any article bars a recovery," or that for some other cause of a like kind the verdict was for so small a sum, so as to show that the suit was commenced in the superior court in good faith, and not for the purpose of evading the operation of the act; the verdict being held to be only *prima facie* evidence of an intent to make such an evasion. As, for instance, where the plaintiff fairly thought he was entitled to interest, but the jury would not allow it. *Johnston v. Francis*, 13 Ired., 465.

37. A action may be maintained in any one of the counties of this state, when both plaintiff and defendant are citizens of other states. *Miller v. Black*, 2 Jones, 341, S. P. *Walters v. Breeder*, 3 Jones, 64.

38. Where a payment had been made on a note, which was originally for more than \$100, which payment reduced it below that sum, but was not endorsed on the note, nor known to the plaintiff, who was assignee of the note, when the suit was brought, *it was held* that, although the note was overdue when the assignment was made, the superior court had jurisdiction of the cause, and the plaintiff could not be nonsuited under the act. *Bean v. Baxter*, 2 Jones, 356. (The act is somewhat altered. See Rev. Code, ch. 31, secs. 37 and 38.)

39. The act, Rev. Code, ch. 31, sec. 37, providing a venue for transitory actions, makes no provision for the case of a resident plaintiff and a non-resident defendant, and *it was held*, therefore, that the case remains as at the common law, which allows the plaintiff to sue in any county, subject to the power of the court to change the venue according to certain rules governing its course. *Covill v. Moffitt*, 7 Jones, 381.

40. As a corporation has no actual residence, it may be sued in the county court of any county in the State, in which the plaintiff resides. *Morehead, v. Atlantic and North Carolina Railroad Company*, 7 Jones, 500.

41. The acts of 1844 and 1846, abolishing jury trials in the county court of a certain county, and giving exclusive jurisdiction to the superior court where the intervention of a jury is necessary, embrace an action of assumpsit begun by attachment, as well as when it is commenced by a *capias ad respondendum*. *Harris v. Hampton*, 7 Jones, 597.

42. The fact that a county court, by a special statute, cannot have jury trials, does not deprive a party of his common law right to have issues of fact tried by a jury; for the issues when

made up may be removed to the superior court for trial. *Buchanan v. McKenzie*, 8 Jones, 91, *S. P. Buchanan v. McKenzie*, 8 Jones, 95.

43. The county courts have a discretionary power to set aside a verdict and judgment and grant a new trial, at any time during the term, and the propriety of its exercise cannot be re-examined on an appeal. *Scaff v. Bufkin*, 8 Jones, 161.

44. An action of covenant for quiet enjoyment is transitory, and, though entered into in another state, the courts of this state may take jurisdiction of it. *Jackson v. Hanna*, 8 Jones, 188.

45. The powers of a court of limited jurisdiction, like the county court, cannot be enlarged by implication. *Thompson v. Cox*, 8 Jones, 311.

See (Executors and Administrators—Of sales by executors and administrators, and herein of purchases by them at their own sales, 26–27.) (Habeas corpus, 3.) (Tenants in common, 30.)

III. OF THE COURT OF EQUITY IN SELLING INFANT'S PROPERTY.

1. A court of equity has a general jurisdiction to direct the sale of the estates of infants, whenever the purpose for which the sale is directed shall be deemed by the court beneficial to the infants. *Williams v. Harrington*, 11 Ired., 616.

2. The decree in such a case cannot be impeached in any other court; neither upon the ground that a guardian was not appointed by the proper court, nor that there was not due advertisement or competent evidence of it, nor that the interest of the infant was not promoted by the sale, nor that, for any other reason, it was not a proper case for a sale, nor that the decree did not find the facts, which showed the sale to be beneficial, nor upon any similar grounds. *Ibid.*

3. Where a decree is made on behalf of infants, for the sale of the lands of the deceased debtor lying in Moore county, and a sale is made of several specified parcels of land, the sale ratified, and an order of the court to convey to a particular purchaser, no exception can be taken to the general description of the land in the decree ordering the sale. *Ibid.*

4. The court has the power, with the consent of the reputed purchaser, to substitute another person in his place; though, as a matter of wholesome practice, such a substitution ought not to be allowed before the payment of the purchase money, nor, perhaps, without looking to the rights even of third persons, as against the first purchaser. *Ibid.*

5. Under an order of the court of equity for the sale of the real estate of infants, the deed of the commissioner, appointed to make the sale by virtue of the provisions of the act of 1827, transferred

to the purchaser the legal title. *Ibid.* (See Rev. Code, ch. 54, secs. 32 and 33.)

6. A sale of land by a decree of the court of equity is, in effect, a sale by the owner of the land through the agency of the court. *Williams v. Council*, 8 Jones, 229.

7. Where land of an infant was sold by a decree of the court of equity, and the purchaser went into possession, but no deed was made by the master during his continuance in office, *it was held* that during this time the purchaser was in as the tenant of the former owner, and that his taking a deed from the clerk and master after his going out of office did not change that relation. Nor was the relation changed, so as to make the possession adverse, by the purchaser's making a deed in trust to secure debts but still remaining in possession. Nor was it changed by an agreement of the purchaser to sell the land absolutely, and an entry and possession by the party contracting to buy, he acknowledging himself the tenant of the first purchaser. *Ibid.*

See (Clerks and Clerks and Masters—Deeds executed by Clerks and Masters.)

IV. OF THE SUPREME COURT.

1. No agreement of the parties can confer on the supreme court a jurisdiction to render any other judgment, than what, in law appears to them ought to have been rendered in the superior court. *Bethea v. McLennon*, 1 Ired., 523.

2. Upon the death of one of the judges of the supreme court, the two surviving judges have full power and authority to hold the court and exercise all its functions. *State v. Lane*, 4 Ired., 434.

3. The only jurisdiction conferred on the supreme court in cases at common law is appellate, after a judgment in the superior court; and where there has been no such judgment the supreme court will not entertain jurisdiction of the cause. *McKenzie v. Little*, 9 Ired., 45.

4. The supreme court has no original jurisdiction of a *sci. fa.* against bail, in an action brought to it by appeal, and in which judgment has been rendered against the principal. The *sci. fa.* must be issued in the court below, in which the bail bond was taken and returned. *Jones v. McLaurine*, 7 Jones, 392.

5. The supreme court cannot take jurisdiction of a suit at law removed by consent, either before or after judgment. *Rodman v. Davis*, 8 Jones, 134.

See (Habeas Corpus, 3-4.)

JURY.

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| I. Who are competent, and who are exempt as jurors.
II. Liability of jurors for non-attendance. | III. Of challenges to the jury.
IV. Of the conduct and the province of the jury in the trial of causes. |
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I. WHO ARE COMPETENT, AND WHO ARE EXEMPT AS JURORS.

1. A freeholder in another state is not competent to serve as a juror in this state, but the objection comes too late after verdict. *State v. Greenwood*, 1 Hay., 141, (162.)

2. The act of 1779, (Rev. Code, ch. 31, sec. 26,) which requires that county courts shall not nominate persons to serve as jurors, who have suits at issue at the term to which they are to be summoned, is only directory and does not apply to grand jurors. *State v. Oldham*, 1 Hay., 450, (518.)

3. Where a jury has decided in a suit on one bond, they are competent to sit in another suit on another bond in which the question is the same. *Sheppard v. Cook*, 2 Hay., 238, (422.) (But see *Baker v. Harris*, 1 Winst., 277.)

4. A commissioner of navigation is not exempt from serving as a talesman. *State v. Hogg*, 2 Murph., 319, S. C. N. C Term R., 254, (684.)

5. Freeholders in another state, owning no freehold in North-Carolina, are not qualified to serve as jurors in this state, and talesmen must be freeholders of the same description as those of the original panel. *Sheepshanks v. Jones*, 2 Hawks, 211.

6. If the sheriff summon as talesmen, persons who are not bystanders in the courthouse, the calling them in will make them competent as such, whether they could have been fined for non-attendance or not. *State v. Lamon*, 3 Hawks, 175.

7. An order to the sheriff to summon talesmen need not be returnable the same day it issued. *Ibid.*

8. The law is silent as to the number of talesmen to be summoned, and the court may, in its discretion, determine the number, or leave the sheriff to summon as many as he may deem necessary. *Ibid.* (The matter is now regulated by statute, see Rev. Code, ch. 35, sec. 30.)

9. A statement on the record that "on balloting, the following jurors are duly elected, sworn and charged to serve as grand jurors," &c., shows a sufficient compliance with the act of 1779. *State v. Seaborn*, 4 Dev. 305. (See Rev. Code, ch. 31, sec. 34.)

10. An irregularity in the mode of empanelling a grand jury can only be taken advantage of by a plea in abatement upon the arraignment, and the objection comes too late after verdict. *Ibid.*

11. The act of Congress of 1825, ch. 275, sec. 35, exempting postmasters to serve on juries, is constitutional; and they cannot

be compelled to serve as jurors on the original panel in the state courts, though *it seems* they may be compelled to serve as talesmen. *State v. Williams*, 1 Dev. and Bat., 372.

12. On the trial of a capital case, the names of the jurors of the original panel should be first put into the box and drawn, before those of the talesjurors are put in and drawn; and the jurors summoned under the special *venire facias*, provided by the act of 1830, are, in this respect, to be regarded as talesmen. *State v. Benton*, 2 Dev. and Bat., 196.

13. The court has a right to excuse jurors, who have been summoned upon a *venire* in a capital case, upon their application for any reasonable cause. *State v. Craton*, 6 Ired., 164.

14. A person who is exempted by law from serving on juries, is not bound to serve as a juror on a *special venire*. *State v. Whitford*, 12 Ired., 99.

15. If it appear that an order for a special *venire* was obtained, and that the jurors attended, it is not necessary that the record should positively show that the writ was issued by the clerk, as it will be presumed that the writ did issue. *State v. Perry*, Busb., 330.

16. To constitute a legal jury under the act, Rev. Stat., ch. 35, sec. 17, it is not necessary that any jurors should be summoned under the special *venire*. The prisoner has a right to the full benefit of the order of the court directing a special *venire*, and if the order has not been obeyed, it would be a good objection to the court's proceeding with the trial; but if the prisoner select his jury, without objection on that ground, it is a waiver of it. *Ibid.* (See Rev. Code, ch. 35, sec. 30.)

17. It is not necessary to the legal constitution of a grand jury, or their legal transaction of business, that an officer should be appointed to wait upon them. It is convenient and proper that they should have such an officer, and when a constable is appointed, he must take the prescribed oath; but not so with the sheriff, who, being a sworn officer of the court, can properly attend on the grand jury without such an oath having been taken by him. *Ibid.*

See (Constitution—Acts which have been declared constitutional, 12.)

II. LIABILITY OF JURORS FOR NON-ATTENDANCE.

1. If a juror be fined for non-attendance, he is liable to be taxed with a fee to the solicitor or attorney for the state on a *sci. fa.* against him. *State v. Whisenhurt*, 1 Murph., 287.

III. OF CHALLENGES TO THE JURY.

1. If the prisoner challenge the 36th juror peremptorily on a capital trial, his challenge shall be disallowed. *State v. Gayner*,

Conf. Rep., 305, (392.) S. C. 2 Hay., 140, (312.) (Only twenty three peremptory challenges are now allowed. Rev. Code, ch. 35, sec. 32.)

2. When a prisoner silently acquiesces in any irregularity in forming a jury, and especially when he partially consents to it for the sake of having a trial, he waives his right to make any exception to the jury after trial. *State v. Ward*, 2 Hawks., 443.

3. An alien is not entitled to a jury *de medietate lingue* in North Carolina. *State v. Antonio*, 4 Hawks., 200.

4. A slave indicted for a capital felony is entitled to a jury of slave owners. *State v. Jim*, 1 Dev., 142. (See Rev. Code, ch. 107, sec. 34.)

5. General hostility between a juror and a party, without any connection with the action to be tried, is a good cause of challenge; but the fact that the juror and one of the parties are stockholders in the same incorporated turnpike company is not a good cause of challenge. *Brittain v. Allen*, 2 Dev., 120.

6. The right of challenge is intended to secure an impartial trial, by excluding objectionable persons from the panel, and not to enable the accused to select a jury of his own choice; therefore, where a juror was challenged for cause by the State, and the challenge allowed, and then the jury was completed before the prisoner's peremptory challenges were exhausted, the sufficiency of the State's cause of challenge will not be examined. *State v. Arthur*, 2 Dev., 217.

7. The State need not assign her cause of challenge, until the panel is exhausted; and then the prosecuting officer must show the cause, and, if it be not allowed by the court, the juror must be sworn and tendered. *Ibid.*

8. The officer prosecuting for the State may, on a capital trial, direct a juror to stand aside until the panel be gone through with, which is a challenge for a cause to be shown at the end of the panel; and if a cause be then shown and disallowed, the prosecuting officer may still challenge the juror peremptorily, or not, at his discretion. But this practice, of permitting the prosecuting officer to defer showing his cause of challenge until the panel be gone through, must be exercised under the supervision of the court, who will restrain it, if applied to an unreasonable number. *State v. Benton*, 2 Dev. and Bat., 196. (The State is allowed four peremptory challenges, by statute, in capital cases. See Rev. Code, ch. 35, sec. 33.)

9. The juror may be examined as to opinions, honestly formed and honestly expressed, manifesting a bias of judgment, not referable to personal partiality or malevolence; but if the opinion has been made up and expressed under circumstances which involve dishonor and guilt, and where such expression may be visited with punishment, he ought not to be required to testify, so as to criminate himself. *Ibid.*

10. An opinion fully made up and expressed against either party, on the subject matter of the issue to be tried, is good cause of principal challenge; but an opinion imperfectly formed, or one merely hypothetical, that is, founded on the supposition that facts are as they have been represented or assumed to be, does not constitute a cause of principal challenge, but may be urged by way of challenge to the favor, which is to be allowed, or disallowed, as the triers may find the fact of favor or indifference. *Ibid.*

11. A challenge of a juror, because of his having formed and expressed an opinion upon the question to be tried, can be made only by the party, against whom it was so formed and expressed. *Ibid.*

12. The forbearing of a court to discharge a juror, to whom no exception has been taken, though there be ascertained cause of challenge against him, cannot be assigned for error, because the right of challenge in the parties remains, and neither of them can be injured by such forbearance to act on the part of the court. *Ibid.*

13. The nature and legal consequences of the practice of putting what is called the *preliminary question* to jurors upon capital trials explained, and such practice, except under particular circumstances, disapproved of; and the legal and regular mode of trying exceptions to jurors, and forming juries on trials for capital offences, pointed out and recommended. *Ibid.*

14. The disallowance of a legal challenge, whereby the party taking the exception is compelled to accept, as a juror, a person whom he had a right to reject, is a ground, not properly for a new trial, but for a *venire de novo*. It is a denial to him of an imperative rule of law, which vitiates the verdict, and lays a good foundation for a writ of error. *Ibid.*

15. An objection to the grand jury comes too late after a plea to the felony. *State v. Martin*, 2 Ired., 101.

16. The right to challenge a juror is a right to reject, not to select; and therefore neither of two defendants on a joint trial upon an indictment has cause to complain of a challenge by the other. *State v. Smith*, 2 Ired., 402.

17. Where a juror was challenged for cause, and it appeared that his wife was cousin to the prisoner's former wife, who was now dead leaving no children, *it was held* that this was no cause of challenge, the affinity having ceased with her death. *State v. Shaw*, 3 Ired., 532.

18. The improper allowing or disallowing of a challenge is a ground for a *venire de novo*, not as a matter of discretion in the court, but of right to the party; and it is therefore a good foundation for a writ of error. *Ibid.*

19. The withdrawal of a juror from the panel by the court, without *sufficient* cause, is in law, however excusable the error,

an arbitrary withdrawal, for which the court has no authority. *Ibid.*

20. The jurors of the original *venire* constitute a distinct panel. When that panel is perused, or gone through with, without forming a jury, any individual member thereof, who, upon the challenge of the State, has been set aside to see whether a jury might not be formed from the panel without him, must be brought forward and challenged or taken, before the special *venire*, or *tales* jurors, can be resorted to. *Ibid.*

21. In the trial of a capital case, the original *venire* ought to be first drawn and tendered; but if the judge should, where there are only eleven of the original panel, direct *tales* jurors to be drawn with them, the prisoner will have no right to a *venire de novo* on that account, if he have had an opportunity of accepting or of rejecting all of the original *venire*. *State v. Lytle*, 5 Ired., 58.

22. Where one of the *venire*, upon being called, was challenged by the State and directed to retire until the panel was gone through with, and was not afterwards recalled, the prisoner making no motion to that effect, and it being known that the juror was a witness for the prisoner, it was held that this was no ground for a *venire de novo* on the part of the prisoner. *Ibid.*

23. After the petit jury in a capital case has been sworn and empannelled, it is too late to object that the grand jury was drawn by a boy of thirteen years of age. If the objection had been a good one at any time, it ought to have been made in the form of a challenge to the array before the petit jury was sworn. *State v. Underwood*, 6 Ired., 96.

24. The state's challenge to a juror for cause need not be decided on immediately, but it is in the discretion of the court to let it stand until the panel be gone through. *State v. Craton*, 6 Ired., 164.

25. In forming a jury in a capital case, if a person be challenged for cause, and state upon his examination "that he had formed and expressed an opinion adverse to the prisoner, upon rumors which he had heard; but that he had not heard a full statement of the case, and that his mind was not so made up as to prevent the doing of impartial justice to the prisoner," the court may find him indifferent, and having so found as a matter of fact, the supreme court cannot revise the decision. *State v. Ellington*, 7 Ired., 61.

26. On the trial of an indictment against a slave for a capital offence, it is good cause of challenge on the part of the State to one called as a juror, that he is nearly related to the owner of the slave, as it would be on the part of the prisoner that a juror was a near relative of the prosecutor. *State v. Anthony*, 7 Ired., 234.

27. On a trial for a capital offence, a special *venire* for one hun-

dred jurors was ordered and returned, and after the original panel was perused and exhausted, the court ordered thirty-six of the tales jurors to be drawn, and, these being exhausted by challenges, directed the remaining tales jurors to be drawn, the prisoner at the time making no objection; and *it was held* that there was no error in the proceeding. *State v. Nash*, 8 Ired., 35.

28. Where, on a capital trial, the prisoner challenges a juror for favor, and the solicitor for the State admits the cause assigned to be true, the prisoner is bound by his challenge, and cannot afterwards be allowed to have the matter tried, either by triers or the court. *State v. Creasman*, 10 Ired., 395.

29. Where a juror, upon being challenged, swears that he has formed and expressed an opinion, but only upon rumor, and that he could do impartial justice, upon hearing evidence in the case, *prima facie* the juror is competent, though, in some cases, the court or the triers may find otherwise. *State v. Dove*, 10 Ired., 469.

30. Although a juror may sit on the trial, against whom there was good cause of challenge, yet the party, by not having made the objection in time, waived it. *Briggs v. Byrd*, 12 Ired., 377.

31. The relationship of a juror to the prisoner, whether by consanguinity or marriage, is a good cause of principal challenge on the part of the State, but such relationship must be within the ninth degree. Hence, where the great-grandmother of the juror and the grandmother of the prisoner were sisters, *it was held* that the juror was in the proscribed degree, and was properly rejected. *State v. Perry*, Busb., 330.

32. A defendant, upon a trial for a felony, though clergyable, is entitled to challenge peremptorily thirty-five jurors. *State v. Caldwell*, 1 Jones, 289. (Twenty-three peremptory challenges is the number now allowed. See Rev. Code, ch. 35, sec. 32.)

33. It is too late after a juror has been tendered and taken by a prisoner, and has served on the trial, for the prisoner to except to his competency. *State v. Patrick*, 3 Jones, 443.

34. Where, upon the trial of a capital case, the scrolls, containing the names of the jurors in the special *venire*, had on them the surnames of the persons written in full, but the christian names were only indicated by initial letters, no objection having been made when the scrolls were put into a hat to be drawn out, *it was held* that this formed no ground for a challenge to the jurors. *State v. Simmons*, 6 Jones, 309.

35. A challenge to a juror, *propter affectum*, involves a question of law, as well as of fact; and though by consent the judge be allowed to take the place of "triers," yet his decision on a question of law may be reviewed in the supreme court. *Schorn v. Williams*, 6 Jones, 575.

36. It is a good cause of challenge to a person tendered as a juror in a civil case, that he is the son-in-law of one who is the

surety for the prosecution of the suit; and where the relationship is admitted or found, it is purely a question of law. *Ibid.*

37. It is not a good cause of a challenge to a juror that he has formed and expressed an opinion against the prisoner upon mere rumor, when he declares that the rumor has not produced such an impression upon his mind as to prevent his doing impartial justice to the prisoner. *State v. Bone*, 7 Jones, 121.

38. The prisoner has no right to postpone showing his cause of challenge to a juror unto the end of the panel, that being altogether the privilege of the State. *Ibid.*

39. It is no ground for a challenge to the array in a capital case, that it does not appear, from an order for a special *venue facias*, that it was made in the case of the prisoner. It is sufficient if it appear that it was made at the term when the trial was had. *State v. Murph*, 1 Winst., 129.

40. A challenge to the array of jurors is generally founded on a charge of partiality, or some default, in the sheriff or other officer summoning them. *Ibid.*

41. Where an action brought by A against B for fraudulently removing a debtor, was tried and a verdict found for the defendant; and immediately afterwards the same jury was called and tendered in a suit for the same transaction by C against B, and were challenged by the plaintiff; *it was held*, 1st, that the challenge was one to the polls, and not to the array; 2nd, that it was a principal cause of challenge involving matter of law, and, therefore, liable to be reviewed upon an appeal; and, 3rd, that the jurors were incompetent, by reason of having set upon and decided the other case, and that, consequently, the challenge ought to have been allowed. *Baker v. Harris*, 1 Winst., 277.

42. Jurors ought not to be asked either on oath or otherwise, whether their minds are in such state that they can try a case fairly and impartially. Their answers can have no influence on the question of their competency, and it is an improper practice to ask them. *Ibid.*

43. If a challenge by the prisoner for good cause be disallowed, and the juror be then challenged peremptorily by the prisoner, but the panel is completed before he has challenged peremptorily as many as twenty three jurors, there is no cause for a new trial. *State v. Cockman*, 2 Winst., 95.

44. A juror challenged by the prisoner, because he had formed and expressed an opinion that the prisoner was guilty, said on his examination by the court, that he had formed and expressed an opinion to that effect from rumor, but that he thought he could give an impartial verdict on the trial, was properly adjudged by the court to be a proper juror to be tendered to the prisoner. *Ibid.*

See (Bastardy—Proceedings in bastardy cases, 32.) (Jury—Who are competent and who exempt as jurors.

IV. OF THE CONDUCT AND PROVINCE OF THE JURY IN THE TRIAL OF CAUSES.

1. If the jury in a capital case separate without giving a verdict, the prisoner shall not be again put upon his trial for the same offence. *State v. Garrigues*, 1 Hay., 241, (276.)

2. If a trial be by thirteen jurors, it is good cause for a writ of error. *Whitehurst v. Davis*, 2 Hay., 113, (272.)

3. If two jurors in a capital case retire without permission and without an officer, it shall not vitiate the verdict, if they will make affidavit that they spoke to no one while they were out. *State v. Carstaphen*, 2 Hay., 238, (422.)

4. It is the province of the jury to weigh the evidence, while it belongs to the court to say whether the evidence offered be conducive to prove the fact. *Jones v. Fulgham*, 2 Murph., 364.

5. If the jury take refreshments while they are charged with a case, it is no cause for a new trial, unless it appear that the refreshments were furnished by the party in whose favor they rendered their verdict. *State v. Sparrow*, 3 Murph., 487.

6. It is the province of the jury to decide, not only on the veracity and credit of the witnesses, but also on what facts are proved by the testimony; and it is error in the court to direct the jury that they must infer one fact from another. *Bank of Newbern v. Pugh*, 1 Hawks, 198.

7. Misconduct on the part of a jury, to impeach their verdict, must be shown by other testimony than their own. *State v. McLeod*, 1 Hawks, 344.

8. A short absence of one of the jurors empanelled, for necessary purposes and without any imputation of improper motives, does not vitiate the verdict of the jury. *State v. Lytle*, 5 Ired., 58.

9. The jury, after they were empanelled, went in a body, under the care of the sheriff, a mile and a half in the country for recreation, but they were kept together, and no one was permitted to speak to them, nor were they permitted to speak to any one, and upon returning they immediately retired to their room, and it was held that there was no impropriety in this, and it was no separation of the jury. *State v. Perry*, Busb., 330.

10. The jury are not judges of the law in criminal trials, and the court commits no error in telling them so. *State v. Peace*. 1 Jones, 251.

11. Where two of the jurors charged in a capital case left the rest of the jury for fifteen or twenty minutes, but did not speak to any one about the prisoner or his trial, nor hear any one speak of him, it was held that there was no ground for awarding a *venire de novo*. *State v. Hester*, 2 Jones, 83.

JUSTICES OF THE PEACE.

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| I. Of justices' warrants in civil cases. | IV Of their jurisdiction, judgment and execution. |
| II. Of justices' warrants in criminal proceedings. | V. Of justices' executions levied on land and returned to court. |
| III. Of the granting of new trials by justices. | VI. Of the responsibility of justices. |

I. OF JUSTICES' WARRANTS IN CIVIL CASES.

1. A warrant, that does not state that the sum demanded is over five pounds, but only that it is under twenty pounds, will not authorize an arrest under the act of 1786, which authorized an arrest when the sum demanded was over five pounds. *Luttreloh v. Powell*, 1 Hay., 395, (455.)

2. A warrant is erroneous, and the judgment on it may be reversed, if it do not appoint some time and place within thirty days for the defendant's appearance. *Anonymous*, 1 Hay., 398, (458.)

3. The plaintiff must state in his warrant the nature of his demand, so as to give notice to the defendant for what he is sued. Hence, if a warrant demand a sum as due by account, the plaintiff cannot claim damages for breach of an agreement. *Davis v. Watters*, 2 Hay., 172, (363.)

4. When a person signs a paper, which may relate either to his personal or political character, if it is intended to relate to the latter, it ought, for the sake of certainty, to be so expressed. But if the paper be peculiar to his political character, there is no need of any addition to his signature. Hence a warrant signed by a justice cannot be avoided, though he does not mention his political character. *Siler v. Ward*, 1 Car. L. R., 548, (161.)

5. In warrants upon penal statutes before a single justice, there must be some reference to the statute which gives the penalty, and the omission of it will be fatal even after a verdict. *Scroter v. Harrington*, 1 Hawks., 192, S. P.; *Buncombe Turnpike Company v. McCarson*, 1 Dev. and Bat., 306.

6. If a warrant state the parties, the sum demanded and how due, it is sufficient. *Hamilton v. Jervis*, 2 Dev. and Bat., 227.

7. A warrant for a penalty must set forth the acts which give the penalty to the plaintiff, in order to show "how the sum is due," which is a matter of substance. But the plaintiff may amend by agreeing to claim no costs from the defendant. *Duffy v. Averitt*, 5 Ired., 455.

8. A warrant from a justice in a civil case need not, on its face, be returnable on a certain day or at a certain place, but only within thirty days. The day and place are to be notified by the constable who serves the warrant. *Ibid.*

9. A justice's warrant in a civil case requires no seal. *Ibid.*

10. A justice's warrant in a civil case must name the proper parties, and state a cause of action within the justices' jurisdiction, both as to the nature and the amount of the demand. *Ibid.*

11. The justice's warrant, for a penalty in not working on a public road, need not show on its face that the road was in the county in which the warrant issues. Warrants never have a venue; and the objection, even if the case had been in a court of record, must have been taken advantage of by plea in abatement. *Ibid.*

12. The continuances of a warrant need not be stated on the face of the proceedings. *State v. Conolly*, 6 Ired., 243.

13. A seal is not required to be affixed to an attachment or warrant issued by a justice in a civil case. *Parker v. Gilbreath*, 7 Ired., 400.

14. The preamble to a warrant constitutes part of it, and where it sets out in apt words the offence for which, as the plaintiff alleged, the defendant had incurred the penalty sued for, the form is a proper one. *Harshaw v. Crow*, 11 Ired., 240.

15. The same strictness is not required in the description of a note in a justice's warrant, as is required in a declaration in court. It is sufficient, if the warrant describe the cause of action, so as to bring it within the jurisdiction of a single justice, as defined by statute. *Emmit v. McMillan*, 13 Ired., 7.

16. A justice has no authority under the act of 1741, Rev. Stat., ch. 24, sec. 10, to appoint a special constable to execute a warrant, or any other process, in a civil case. *Garlick v. Jones*, 3 Jones, 404. (See Rev. Code, ch. 24, sec. 11.)

17. A warrant against a railroad company for the non-payment of a certain sum "due by damage sustained," there being nothing in any other part of the proceedings to make it more definite, is fatally defective. *Wagoner v. North Carolina Railroad Company*, 5 Jones, 367.

See (Arrest, 8.)

II. OF JUSTICES WARRANTS IN CRIMINAL PROCEEDINGS.

1. If a justice issue a warrant for a matter within his jurisdiction, though he may have acted erroneously in the previous stages, the officer should execute it; but if it be for a matter not within his jurisdiction, the officer ought not to execute it. *State v. Curtis*, 1 Hay., 471, (543.)

2. If the officer be a known one of the district where he is acting, he need not show his warrant when he makes the arrest; but if he be an officer appointed for a special purpose, he ought to show his warrant, if demanded. *Ibid.*

3. When he makes the arrest, he should briefly inform the party arrested of the cause; otherwise the arrest is not good. *Ibid.*

4. If the warrant want a seal, it is void, and will not justify the officer in making an arrest. *Ibid.*

5. A search warrant can be granted only to seize stolen goods; and when a warrant recited that A had enticed the negroes of B to leave him, and that he was harboring them, and commanded the officer to seize them, *held* that the justice had no authority to issue it, and that it did not justify the officer. *State v. McDonald*, 3 Dev., 468.

6. An officer cannot decide whether a warrant, professedly within the jurisdiction of the magistrate issuing it, be issued properly, but he must, at his peril, determine whether he who issued it had jurisdiction of the matter. *Ibid.*

7. A warrant to arrest persons, neither named nor described, is void. And a warrant, reciting that A B and "company" had committed an offence, and commanding the officer to apprehend said "company," will not justify the arrest of any person; for the mandatory part does not direct the taking of A B by name, or by any description, and it is not helped by the recital; for the words "said company" refer only to the company with A B, and not to A B himself. *Mead v. Young*, 2 Dev. & Bat., 521.

8. Criminal process, defective for uncertainty in the description of the defendant, is not aided by the act of 1794, providing that warrants shall not be set aside for want of form, for that act, in its terms, applies to civil process only; and besides, the description of the defendant is matter of substance. *Ibid.* (See Rev. Code, ch. 62, sec. 22.)

9. A warrant for the apprehension of a man's person cannot be rightfully altered, even by another magistrate, after it has finally left the hands of the one who issued it. And if it be altered by another magistrate, after it has been so issued, by inserting the name of another person to be apprehended, it will be no justification to the officer who executes it, for taking such other person. *Haskins v. Young*, 2 Dev. & Bat., 527.

10. In a warrant for the penalty incurred by a violation of the act prohibiting the sale of spirituous liquors, &c., near a church, &c., it is not necessary to name the person or persons to whom the articles were sold; because each act of selling is not a distinct offence, but only one offence is committed, and only one penalty incurred by the same individual, by any number of sales to any number of persons in the same day. *State v. Muse*, 4 Dev. & Bat., 319. (See Rev. Code, ch. 97, secs. 7 and 10.)

11. A warrant for the penalty under the acts (before they were revised and consolidated) should have concluded against the form of *the statutes*; the rule being, that when an act cannot be made out to be criminal, or a penalty to be incurred, without reading more than one statute, it is then necessary that the indictment, warrant or declaration should conclude "against the form of the statutes," in the plural. *Ibid.* (The rule is now

altered and no judgment shall be stayed whether the conclusion be either in the singular or plural. See Rev. Code, ch. 35, sec. 20.)

12. A justice has no right to issue a search warrant for runaway slaves, or for such as have been seduced away. He can only issue such a warrant for goods or chattels, which are distinctly alleged to have been stolen. *State v. Man*, 5 Ired., 45.

13. Where, on the face of a search warrant, it appears that the justice had no jurisdiction, it will not protect the officer who executes it from being a trespasser. *Ibid.*

14. The justice ought not to issue any warrant except on the oath of some person; but although it does not appear to have been issued on oath, the officer is justified in executing it, if the subject matter be within the justice's jurisdiction. *Ibid.*

15. A seal is indispensably necessary to a warrant issued by a justice to arrest a defendant on a criminal charge. *Welch v. Scott*, 5 Ired., 72.

16. It is the duty of a justice, before issuing a warrant on a criminal charge, except in cases *super visum*, to require evidence on oath amounting to a direct charge, or creating a strong suspicion of guilt; and an innocent person, arrested on a warrant issued by a justice, not on his own view, nor on any oath, would have an action against the justice. But the officer executing such warrant is justified, the subject matter being within the justice's jurisdiction, though it do not appear upon what evidence it was issued. *Ibid.*

17. A seal is essential to a warrant issued by a justice to arrest a person for a criminal offence, and if there be no seal, the warrant is void, and the defendant is justified in resisting its execution. *State v. Worley*, 11 Ired., 242.

18. Whether there be a seal or not, is a mixed question of law and fact, to be decided by the judge below, and from his decision there is no appeal to the Supreme Court. *Ibid.*

19. A justice has no power to issue a warrant to search for a runaway negro, and neither the justice who issues it nor the officer who acts under it will be protected against an action of trespass, by one whose premises are invaded. *Cohoon v. Speed*, 2 Jones, 133.

20. The deputation to a person to execute a state's warrant under the act, Rev. Stat., ch. 34, sec. 10, ceases with the execution of the warrant and the return of it, together with the bringing the defendant therein before a justice. *State v. Dean*, 3 Jones, 393. (See Rev. Code, ch. 24, sec. 11.)

21. The deputation of such person to take a defendant to jail, under a *mittimus*, cannot be given by the justice by parol, but must be in writing. *Ibid.*

22. A state's warrant issued in a county bordering on South Carolina, charging that the defendant "committed murder somewhere between this place and Texas," is void, as being too vague and indefinite. *Price v. Graham*, 3 Jones, 545.

23. A warrant to arrest a fugitive from justice under the act, Rev. Stat., ch. 35, sec. 5, is required to be issued by two justices, and is void if issued by one only. *Ibid.* (Such a warrant may now be issued by one justice. See Rev. Code, ch. 35, sec. 5.)

24. Where, in the recital of a state's warrant issued by a justice, the true name of the defendant is inserted, but in the mandatory part it is misrecited, the discrepancy will be cured by the reference to the name in the recital. If it were necessary, however, the justice who issued it might, at any time afterwards, correct the mistake. *Blair v. Horton*, 6 Jones, 543.

See (Penal Statutes, 5-9-15.) (Towns, 3.)

III. OF THE GRANTING OF NEW TRIALS BY JUSTICES.

1. Where a judgment was rendered by a justice against an absent party, and the party within ten days thereafter applied for a new trial under the act, Rev. Stat., ch. 62, sec. 15, the justice has no right summarily to vacate the judgment; and, if he do so, the order will be void, and the original judgment will remain in full force. *Sloan v. McLean*, 12 Ired., 260. (See Rev. Code, ch. 62, sec. 15.)

2. It was the duty of the justice, in such case, to issue a notice to the opposite party, and an order to summon witnesses and produce all the papers before him, or some other justice, at someday within thirty days, in the mean time directing a forbearance of proceedings; and on the appointed day the case should be reconsidered. *Ibid.*

IV. OF THEIR JURISDICTION, JUDGMENT AND EXECUTION.

1. The judgment of a justice does not bind lands; and if the defendant sell his land before a levy upon them under a justice's judgment, the purchaser will acquire a good title, though the levy be afterwards returned to the court, and the lands be sold under an order of court made for that purpose. *Cresman v. George*, Tay., 22, (17.)

2. When a trial by jury is dispensed with, the justice must nevertheless observe the course of the *common law* in trials; he must give notice to the party of the charge against him, and give him an opportunity of making his defence; and the evidence must be such as the common law approves of, unless the statute expressly directs otherwise. *State v. Barrow*, 3 Murph., 121.

3. Whenever a special power is given to a justice by statute to correct an offender in a summary way, without a trial by jury, he must strictly pursue that power. *Ibid.*

4. When a levy is made by a constable on the defendant's land under a justice's execution, and returned the same day to the county court, which commenced its session on that day, *held* that this was a return "to the next court," under the act regu-

lating the duties of constables in that respect. *Lanier v. Stone*, 1 Hawks, 329.

5. When a justice issues an execution in the first instance, against "goods and chattels, lands and tenements," such execution is not in the form required by the act of 1794, but if the constable return that, in default of chattels, he has levied on land, it corrects the irregularity, and it is also cured by the 16th section of the act of 1794. *Ibid.* (See Rev. Code, ch. 62, secs. 16 and 22.)

6. It is not necessary that a *vend. expo.*, issuing from court on a constable's levy on land, should be made returnable at any given time, as it will be returnable, of course, to the next ensuing term. *Ibid.*

7. When, on the return of a constable that he had levied on land, a *vend. expo.* was moved for, and a writ issued as follows, "ordered by the court that the land, &c., (describing them) levied on by the constable be sold," though the order of sale and the paper called the *vend. expo.* be blended together, yet it sufficiently appears that there was such order. *Ibid.*

8. Where a record states that a *vend. expo.* was returned, on the first day of the term, satisfied by the sale of land, and it appears from the case that the land was actually sold on the second day of the term, it will be presumed that the clerk made such an entry, on the record, with reference to the legal fiction that the term consists of but one day. *Ibid.*

9. When a judgment and execution are written on the same paper with the warrant issued by a justice, and the warrant is properly directed, such direction will also extend to the execution, and need not be therein repeated. *Forsythe v. Sykes*, 2 Hawks., 54, S. P., *Governor v. Bailey*, 3 Hawks., 463.

10. An execution from a justice of the peace binds lands from the levy, and an order of sale subsequently made has relation back to that time. *Ellar v. Ray*, 2 Hawks., 568.

11. By the act of 1803, all executions issued by a justice of the peace must be made returnable in three months, and an officer is not at liberty to return them unexecuted, in a shorter time. *Nesbit v. Ballow*, 3 Hawks., 57. (See Rev. Code, ch. 62, sec. 16.)

12. A justice's execution binds chattels from its *teste*. *Beckerdite v. Arnold*, 3 Hawks., 296.

13. When a justice enters a judgment on the back of a warrant, and writes "execute and sell according to law," the latter words must be deemed an execution; and if a constable receive the money under it from the defendant, he and his sureties will be liable therefor on his official bond. *Governor v. Bailey*, 2 Hawks., 463.

14. A justice has no jurisdiction, where the sum sought to be recovered is not a balance due, but damages for the non-perform-

ance of an agreement. *State v. Alexander*, 4 Hawks, 182.

15. A justice's judgment is not a record, and does not prove itself; it, however, resembles a record in the particular, that its merits are not examinable in another suit, and an action of assumpsit will not lie on it. *Hamilton v. Wright*, 4 Hawks, 283.

16. A single justice has no jurisdiction of actions founded upon a covenant of guaranty. *O'Dwyer v. Cutler*, 1 Dev., 312, S. P., *Adcock v. Fleming*, 2 Dev. and Bat., 225, and 470.

17. Whether the seal of a justice is necessary to a valid judgment is doubtful, but the want of it cannot be objected after a verdict. *Humphreys v. Buie*, 1 Dev., 378.

18. Debt, and not assumpsit, is the proper remedy against the stayor of an execution, when the judgment is dormant, and it lies against him, without joining the principal. *Ibid.*

19. A justice has jurisdiction for a balance due on an executed contract, for which *debt* or *indebitatus assumpsit* will lie, but he cannot give damages for the breach of an executory contract. *Tyer v. Harper*, 1 Dev., 387.

20. Where the defendant covenanted to pay a certain price per hundred for carrying goods, and to deliver a certain quantity to the carrier, but delivered less, *it was held* that a justice had no jurisdiction as to that part of the contract which had not been performed. *Ibid.*

21. A justice's judgment must be evidenced by a written memorial made at the time of rendition; and where a judgment was confessed before a magistrate out of his county, and an entry thereof made on the warrant, and afterwards a new confession was had before the same justice within his county, but no written entry thereof was made, and no alteration of the date of the old entry, *it was held* that in law there was no judgment. *Hamilton v. Parrish*, 1 Dev. 415.

22. One, who enters himself as surety for the stay of execution, is not thereby estopped to show that the supposed judgment is a nullity. *Ibid.*

23. A levy upon land under a justice's judgment, made more than three months after the date of the execution, is void, and, therefore, a *sci. fa.* against heirs founded upon it was dismissed. *McEachin v. McFarland*, 1 Dev. 444.

24. A single justice has jurisdiction of implied contracts; therefore, where upon the death of a man his wife appropriated money belonging to his estate to her own use, *it was held* that it might be recovered by a warrant, without proof of an express promise to pay it. *Ferrell v. Underwood*, 2 Dev., 111.

25. The jurisdiction of a single justice extends to all cases where a general *indebitatus assumpsit* will lie. *Ibid.*

26. A justice's judgment, "that the plaintiff pay costs," is not a judgment on the merits, because it may be upon matter collateral to them. Evidence of what the justice meant by such

judgment is improper, as the entry must speak for itself; but it is otherwise as to the fact, whether the merits were enquired into when the judgment was rendered. *Ibid.*

27. Where one promised to pay a debt as soon as he had collected certain notes, *it was held* that a single justice had no jurisdiction of the matter, until the money was actually received by the defendant on the notes, because until that was done the only remedy for the plaintiff was a special action on the case for neglect in making the collection. *Fentress v. Worth*, 2 Dev., 229.

28. Where the plaintiff has an election to sue either in tort or in contract, he cannot maintain assumpsit upon an implied contract before a single justice; as the suit must be brought in a court which has jurisdiction of the tort. *Clark v. Dupree*, 2 Dev. 411.

29. In reviewing a justices judgment, every fact necessary to support it is to be taken as found, unless the contrary appears. *Haines v. Dalton*, 3 Dev. 91.

30. A justice can try the truth of any plea, which, if sustained, would bar the action within his jurisdiction. *Ibid.*

31. The judgment of a justice for a sum above his jurisdiction is void, and no action can be sustained upon it. *Jones v. Jones*, 3 Dev., 360.

32. The expression "liquidated accounts," as explained by the act of 1829, means "signed accounts," and, therefore, where A and B were partners, and A gave his own note for a debt of the firm, and B wrote a letter to A stating that he would pay the debt to the creditor, *it was held* that the account was not thereby "liquidated" as against B, so as to give exclusive jurisdiction of the demand to a justice, although the note, letter written and action brought were before the act of 1829. *Wilson v. Jennings*, 4 Dev., 90. (See Rev. Code, ch. 62, sec. 6.)

33. An account for a sum exceeding sixty dollars must be signed, in order to give a justice jurisdiction to try a warrant on it for money "due by account." *McFarland v. Nixon*, 4 Dev., 141.

34. A promise by A to pay the debt of a third person, which was less than sixty dollars, on his being discharged from custody, is within the jurisdiction of a justice, though the debt be payable "in trade." *Cooper v. Chambers*, 4 Dev. 261.

35. Justices have no jurisdiction beyond sixty dollars, except when the debt is secured by a bond, note or liquidated account, and an attachment issued by and returnable before a justice, founded upon two former judgments for a sum not exceeding that amount, is void, and is no justification to an officer acting under it. *Bryan v. Washington*, 4 Dev., 479.

36. But a warrant may be brought before a justice, and the plaintiff declare on his old judgment, though the interest accrued may make the sum due on the old judgment more than sixty dollars. *Ibid.* (See Rev. Code, ch. 62, sec. 6.)

37. A justice may, under the act of 1803, postpone a cause pending before him, for thirty days, excluding sundays. *Shipman v. Mears*, 4 Dev. 484. (See Rev. Code, ch. 62, sec. 13.)

38. Upon a covenant to pay \$60 annually for two years, for the hire of a slave, and also to furnish the slave with food, &c., *debt* may be brought before a justice for one year's hire; and if the warrant call for that sum due by *bond*, it will be well supported by the production of the covenant. *Hamilton v. McCarty*, 1 Dev. & Bat., 226.

39. The act of 1828, which enacts that a justice's execution shall bind personal property only from its levy, was passed only for the protection of purchasers from the defendant in the execution, and, therefore, if the defendant die after the *teste* of such execution, but before its levy, his administrator is bound thereby, and the goods in his hands may be levied upon and sold without a *sci. fa.* to revive the judgment. *McCarson v. Richardson*, 1 Dev. & Bat., 561. (See Rev. Code, ch. 45, sec. 20.)

40. A single justice has jurisdiction of a contract "to pay the sum of one hundred bushels of corn," and the warrant is sufficient, if it be "to answer, &c., of a plea of debt, the sum of one hundred bushels of corn." *Hamilton v. Jervis*, 2 Dev. and Bat., 227.

41. A plaintiff may warrant upon any demand of which, in terms, jurisdiction has been given to a single justice, although the investigation of the demand may lead to enquiries into subjects, of which direct jurisdiction has not been given. *Adcock v. Fleming*, 2 Dev. and Bat., 470.

42. The term "book account," may comprehend a "signed" account, as well as an open one; and where the judgment of a single justice appears to have been given on a warrant for more than sixty dollars, "due by book account," it is to be taken in support of the justice's jurisdiction, that the book account was a signed account. *Turner v. Edwards*, 2 Dev. and Bat., 539. (See Rev. Code, ch. 62, sec. 6.)

43. Where an execution upon a justice's judgment is levied upon land, and returned to the county court, under the act of 1794, it is essential to the validity of the order, which the court is authorised to make, to sell the land levied on, that the land should be particularly described; and a levy, in general terms, upon the defendant's "lands," without further specification or description, will not support such order, nor the sale made under it. *Borden v. Smith*, 3 Dev. and Bat., 34. (See Rev. Code, ch. 62, secs. 16 and 17.)

44. Where an execution upon a justice's judgment is levied upon land, and returned to the county court, and it appears that the defendant has not had five days notice, in writing, as required by the act of 1828, the court has no power to order a sale of the land levied upon, and any such order will be entirely null,

unless the defendant appears and waives notice. *Ibid.* (See Rev. Code, ch. 45, sec. 24.)

45. Where a justice's execution has been levied upon land and returned to the county court, the plaintiff may apply to that court, and have a judgment *there* rendered in his behalf for the sum recovered before the justice, and for costs, under the act of 1822, and *it seems* that a *vend. expo.* may issue upon such judgment to sell the land levied on, with a special *fi. fa.* to levy generally for any unsatisfied balance of such judgment; but the power of the court to render such judgment, and issue a *fi. fa.* thereon, depends upon the fact whether a levy sufficiently special has been made, and also whether the defendant has had five days' notice in writing before court, or has waived it, and if no such judgment has been rendered, a writ to the sheriff commanding him to sell the land levied on cannot have the effect of a *fi. fa.* *Ibid.* (See Rev. Code, ch. 45, secs. 12 and 13.)

46. A person having an account against another, for work and labor done, may give the other credit for such sums as may be justly due him on account, and if the balance be thereby reduced below sixty dollars, may warrant for it before a single justice, and the other party can neither object to the jurisdiction, nor insist upon having *his* account of the same items allowed as a set off to the plaintiff's demand. *McRae v. McRae*, 3 Dev. and Bat., 85.

47. Justice's executions are by law returnable *in* three months from their date, but it is not necessary that they should be returned on the last day of the three months. They may be returned sooner and *aliases* taken out and acted upon. *Islay v. Stewart*, 4 Dev. and Bat., 160. (See Rev. Code, ch. 62, sec. 16.)

48. The signature of a justice is absolutely necessary to an *alias*, as well as to an original execution on a justice's judgment. Hence an entry of "execution renewed," without the signature of a justice, at the foot of a dormant justice's execution, gives no authority to the acts of an officer under it. *Higgins v. Ketchum*, 4 Dev. and Bat., 414.

49. The levy of a justice's execution upon lands, under the act of 1794, need not perhaps be in the very words of the act; but a description containing *a part only of that prescribed in the act* must be taken to be insufficient in point of the certainty thereby required, until it is shown as a fact that it identified the land levied on, as effectually as it would have been identified by a description conforming to that given in the act. Hence, a levy "on all the lands of the defendant lying on Queen's creek," without any such evidence of identity, is not sufficiently specific to authorize the court to make an order of sale, or, if such order be made, to support a sale under it. *Ibid.* (See Rev. Code, ch. 62, sec. 16.)

50. The levy of a justice's execution upon "all the lands of the defendant, lying on the head waters of Ketchum's mill pond, adjoining the lands of the said Ketchum," is substantially, if not literally, a compliance with the requisitions of the act of 1794. *Ibid.*

51. If a justice's execution be levied upon land and returned to court, and the land be sold under a *vend. expo.*, issued upon an order made by the court for that purpose, the lien has relation back to the time of the levy, so as to defeat a sale made afterwards by the defendant. *Ibid.*

52. A justice's judgment, apparently regular, cannot be collaterally impeached by evidence that the constable, by whom the warrant purported to have been executed, was a man of general bad character, and not to be trusted in any thing he might say or do, or by any other parol evidence to show that the warrant had not in fact been executed. It is a judicial proceeding which is conclusive, unless upon some other proceeding directly to avoid it. *Jones v. Judkins*, 4 Dev. and Bat., 454.

53. When the proceedings before a justice, upon which he issues an execution, are annexed to the execution, and it is apparent from them there is no judgment authorizing an execution, the constable who has the execution must take notice of that fact, and will be guilty of a trespass, if he proceed to make a levy under the process. *Whitfield v. Johnston*, 1 Ired., 473.

54. Where one owes a debt, by note, of more than one hundred dollars, and gives in lieu thereof two or more notes, each of less than that amount, to the intent that judgments may be taken thereon before a justice, this is neither a fraud or evasion of the statute, prescribing the jurisdiction of justices out of court. *Fortescue v. Spencer*, 2 Ired. 63.

55. The description of the land levied on by a constable under a justice's execution ought to conform to the words of the statute, though it will be sufficient if it distinguishes and identifies the land levied on. *Smith v. Low*, 2 Ired. 457. (See Rev. Code, ch. 62, sec. 16.)

56. Judicial proceedings before a justice are conclusive in their effects, but they do not prove themselves like records, and parol evidence may be introduced to prove that they are void. *Carroll v. McGee*, 3 Ired., 13.

57. If a constable, in returning to court a levy on land, does not describe it as required by the statute, a purchaser under a *vend. expo.* issued by the court, in order to support a title in a trial at law, must show by extrinsic evidence, that the return does as completely identify the land as it would have been identified by a literal observance of the statute. *Blanchard v. Blanchard*, 3 Ired., 105.

58. When an officer has levied a justice's execution on land and returned it to court, his return of a copy of the notice given

to the defendant, with his official certificate that he has served it, is sufficient *prima facie* evidence of such service. And it is not necessary that the court, in making an order for the sale of land so returned as levied on by the constable, should set forth that the notice had been proved to them to have been previously given. *Davis v. Abbott*, 3 Ired., 137.

59. A county court cannot order a *vend. expo.* upon the return of a levy on land under a justice's execution, unless it also appears on the return that there were *no goods* to be levied on; nor when it appears on the return that goods were levied on, but not a sufficiency of them to satisfy the execution, and it does not appear how those goods were disposed of. *Henshaw v. Branson*, 3 Ired., 298.

60. Where a justice has jurisdiction of the principal question, as on a contract to pay for certain articles, he has also the jurisdiction to determine every incidental question, as for instance, whether the condition upon which the contract was to be executed has been performed. *Garrett v. Shaw*, 3 Ired., 395.

61. Executions from justices are entitled to priority, as between themselves, according to the time at which they came to the officer's hands. And if the officer neglect to levy first an execution from a justice which first comes to his hands, he and his sureties are liable to the creditor having such execution. *State v. Vick*, 3 Ired., 488.

62. Where a constable returned on an execution against A B, "levied on land supposed to be upwards of 100 acres, where Richard Heath lives on—no other property to be found," and it appeared in evidence that A B had two tracts of land in the county, each of about 100 acres, on one of which he lived himself, and on the other James Heath lived, and that the latter was known as the land of A B on which James Heath lived, *it was held* that the want of certainty in the description of the land levied on was not aided by the parol evidence, and that the party claiming by purchase at a sale made under that levy acquired no title. *Morrissey v. Love*, 4 Ired., 38.

63. Where the identity of land levied on by a constable, with that claimed under a purchase under that levy, is sought to be established by parol evidence, the enquiry is one of fact for the jury and not of law for the court. *Ibid.*

64. Any irregularity in the return of a justice's execution levied on land, as that it was not returned to the next court, or that the personal property was not exhausted, or any error of the court in ordering a sale of the land, when the personal property levied on has not been exhausted, can only be objected to by the defendant in the execution. *Whitaker v. Petway*, 4 Ired., 182.

65. Where the execution of a justice is on the same paper with the judgment, it must be taken to refer to the judgment, and is thus made certain as to the debt, interest and costs, and as to the person who recovered the same. *McLean v. Paul*, 5 Ired., 22.

66. Where the levy of a justice's execution was "on 450 acres land, adjoining the land of A, B and C," the court cannot see any objection to the levy on its face, and cannot, without further evidence, say that the land was not sufficiently identified under the act. *Ibid.*

67. Upon the return of a justice's execution levied on land, the awarding of the *vend. expo.* or order of sale imports that notice has been given to the defendant in the execution, and especially is this so when the court expressly declares that such notice has been given; and this is sufficient to be shown by the purchaser under the execution in an action of ejectment, for parol evidence could not be admitted, in such action, to show that the defendant in the justice's execution had notice of the levy on his land. *Ibid.*

68. A single justice has jurisdiction of debts, though above sixty dollars, if founded on a former justice's judgment. *Morgan v. Allen*, 5 Ired., 156.

69. Where a justice gives a judgment against a defendant, for a sum beyond his jurisdiction, the defendant may have an action for any acts done under it, or he may resort to a writ of false judgment, to have it set aside. If he choose to appeal to the county court, he can there take advantage of the objection only by plea in abatement, or, according to the established course of our courts, under the general issue. *Ibid.*

70. When an execution from a justice has been levied on personal property, and is afterwards stayed according to law, the levy is released, and the owner may sell the property to whom he pleases. *Hamilton v. Henry*, 5 Ired., 218.

71. An execution from a justice was issued against a defendant in his lifetime, and after his death, and before the return day of the execution, it was, for want of chattels, levied on lands, the levy returned to the county court, and, after due notice to the heirs, the court ordered the lands to be sold, and that a *vend. expo.* issue for that purpose: *held* that the levy was good and the proceeding regular, and that when the sale took place, it should have relation back to the levy, and the proceeds should be applied to that execution, in preference to executions subsequently issued from a court of record, on a judgment against the heirs upon a *sci. fa.* *Parish v. Turner*, 5 Ired., 279.

72. Where a party is dead, at the time of the levy on lands under a justice's execution, notice to his heirs is as effectual as if given to the party himself, when living. *Ibid.*

73. A justice's warrant, in a civil case, was dated June, 1843, the judgment in June, 1844, and the execution in September, 1844, the judgment and execution being on the same paper with the warrant: *held* that it did not appear on the face of these proceedings that the judgment was void, so as to render the officer who served the execution guilty of a trespass. *State v. Conolly*, 6 Ired., 243.

74. If the judgment could be reversed by a writ of false judgment, yet it could not be impeached collaterally. *Ibid.*

75. A justice has no jurisdiction of a question of guaranty. *Wall v. Nelson*, 6 Ired., 300.

76. In the case of the return of the levy of a justice's execution on land to the county court, though notice is directed by law to be given to the defendant, no evidence is required of that notice but the record of the county court ordering the *vend. expo.* *Ward v. Saunders*, 6 Ired., 382.

77. The description, in the return of a constable, of a levy on land, need not literally comply with the act of Assembly in such cases, its requirements being substantially, that the land should be sufficiently distinguished and identified. *Ibid.*

78. An account, though signed by the defendant, is not a liquidated account, so as to give a justice jurisdiction of it, when over \$60 and under \$100, when it does not show on its face to whom it is due, nor that it is a settled account between the parties. *Midjet v. Watson*, 7 Ired., 143. (See Rev. Code, ch. 62, sec. 6.)

79. A liquidated account, under the act, means one in which the debt is adjusted, and the balance stated, without the necessity of having recourse to extrinsic evidence. *Ibid.*

80. Where a return of a levy on land by a constable conforms in its description to the act, setting forth among other things that the land lies on a creek, naming it, and it appears that there are several creeks in the county of that name, it is competent for a party to an ejectment suit brought to recover the land sold under that levy, to show which creek was intended when the levy was made. *Parks v. Mason*, 7 Ired., 362. (See Rev. Code, ch. 62, sec. 16.)

81. Where a judgment was rendered by a justice upon a return of the constable on the warrant "executed," but not having the name of the constable signed to the return, *it was held* that this judgment was not *void* for the want of the constable's signature. *McElrath v. Butler*, 7 Ired., 398.

82. Where a judgment was obtained subsequently, upon the judgment mentioned in the last section, *it was held* that the defendant could not be relieved from the last judgment by writ of *recordari*, without first having the prior judgment reversed. *Ibid.*

83. A justice's judgment, though not matter of record, determines between the parties their respective rights in the matter of controversy; and neither party can, in a subsequent proceeding to enforce it, deny or contest the matters of fact ascertained by it. Therefore, a defendant, who is sued upon a judgment obtained before a justice, has no right to plead that he was an infant when that judgment was rendered. *Ludwick v. Fair*, 7 Ired., 422.

84. The officer making a levy on land, under an execution from a justice, must make his return of the land levied on, on the judg-

ment and execution, when they are on one and the same paper, or on the execution when they are on different ones, or on some paper annexed to the one or the other, and which would constitute a part of it, and have to be recorded with it; otherwise a sale made under the execution will be void. *Dickson v. Peppers*, 7 Ired., 429.

85. Where a warrant was issued against three, and returned "executed," and the judgment was entered against the "defendant" in the singular number, and so was also the entry of the stay of execution, and especially where the justice who rendered the judgment was himself a party defendant, *it was held* that, in another warrant against one of the defendants on the original cause of action, the plea of former judgment could not be supported, because it could not be shown that the former judgment was against *him*. *Thomas v. Holcombe*, 7 Ired., 445.

86. A justice has no jurisdiction of such a contract as the following: "I, the subscriber, promise H. S., that if he can make it appear that I had in my hands as constable, for collection, three notes for \$75 each, in favor of the administrators of S. S., deceased, against J. S. and others, and endorsed by B. B., then, and on that evidence, I am to stand indebted to him, H. S., for one of said notes, and interest thereon from April 26th, 1842." *Spencer v. Hunsucker*, 8 Ired., 9.

87. One, against whom a justice's judgment has been obtained, cannot attack that judgment collaterally, on the ground that he was not duly served with process, or notified of the day and place of trial; but to avail himself of these objections he must impeach the judgment directly, by application to the justice or to a higher tribunal, to set it aside or to reverse it. *Hooks v. Moses*, 8 Ired., 88.

88. The jurisdiction of a single justice extends to all cases for the recovery of money, when the amount is within the sum designated in the act, when a general *indebitatus assumpsit* will lie, whether the contract is express or implied in law. *Mitchell v. Walker*, 8 Ired., 243. (See Rev. Code, ch. 62, sec. 6.)

89. Where an execution from a justice has been levied on land and returned to the county court, where judgment is rendered for the plaintiff, he may either have an order of sale, under which he can only sell the land levied on, or he may take out an execution as in other cases of judgment. If, however, he take an order of sale, he may add a special *fi. fa.* to the *vend. exp.* *Powell v. Baugham*, 9 Ired., 153.

90. If the jury can collect from the testimony, that the description of land levied on by a constable under a justice's execution as fully identifies it, as if the words of the act of assembly had been literally followed, the levy must be pronounced to be good. *Jones v. Austin*, 10 Ired., 20.

91. Where the return of a constable of a levy on land, under a

justice's execution, does not state that there was a want of goods and chattels, and the county court directs a *vend. expo.*, the court must be presumed to have acted right; to have acted upon a waiver of the search for goods and chattels. *Ibid.*

92. A note for seventy dollars, payable in current bank notes, though not negotiable, is within the jurisdiction of a justice. *State v. Corpenning*, 10 Ired., 58.

93. A justice, before whom a warrant is tried, is not permitted to sign the name of a surety to the stay of execution, even though the person, whose name is signed, afterwards assents to it and pays the judgment. *Rickman v. Williams*, 10 Ired., 126.

94. It seems that no one but the surety himself, or one for him in his presence, can sign his name to the stay of a justice's execution. *Ibid.*

95. Where a surety signs a stay of a justice's execution, without any request from the principal, and afterwards pays it, it is a mere voluntary payment, and gives him no cause of action against the principal. *Ibid.*

96. Where a principal gave his surety, for his indemnity, a lien on some hogs, which the principal afterwards sold to a third person, and the surety refused to deliver the hogs unless the purchaser agreed to pay the debt for which he was bound, and the purchaser agreed to do so, but failed, and the surety had to pay the debt himself; *it was held* that a justice had no jurisdiction of a suit by the surety, to recover the money from the purchaser of the hogs. *Ca le v. Hamillon*, 11 Ired., 231.

97. When a justice renders a judgment in a case where he has jurisdiction, every thing is presumed to have been done, which it was necessary to do to make the judgment regular; and his judgment, like one given in a court of record, is in full force until reversed. *Hiatt v. Simpson*, 13 Ired., 72.

98. To authorize a sale of land by order of the county court, there must have been a levy of the execution issued by the justice; and proof by the officer, that he adopted the levies endorsed on the executions, before issued on the same judgments, and that he *considered them as his levies*, is insufficient. In such case the court had no power to make the order of sale, and its proceeding was a nullity. *Brazier v. Thomas*, Busb., 28.

99. The penalty of \$100 imposed by the act, Rev. Stat., ch. 34, sec. 73, to be paid to the owner for harboring a runaway slave, is not within the jurisdiction of a single justice. *Branch v. Houston*, Busb., 85. (See Rev. Code, ch. 34, sec. 92.)

100. Where jurisdiction is withheld by law, a plea in abatement need not be put in, as a court, *of its own motion*, will stay its action in such case. *Ibid.*

101. Where the payee of a bond untruly endorsed thereon a payment, for the purpose of bringing the amount within a justice's jurisdiction, upon a suit being brought before a justice, *it*

was held to be a fraud upon the law, and a plea in abatement could be sustained. *Moore v. Thomson*, Busb., 221.

102. Where one, who had appealed from the judgment of a justice, countermanded the appeal, and at his request the justice withheld it, *it was held* that the judgment was reinstated in full force, and would maintain a suit founded thereon, and this, although the appeal was countermanded upon an agreement of the opposite party to refer the whole matter to arbitration, which agreement he had violated. *Sturgill v. Thompson*, Busb., 392.

103. A justice's judgment on a warrant against an administrator, ascertaining the amount due, and having endorsed thereon a suggestion of the defendant's intention to plead "no assets," according to the act, Rev. Stat., ch. 46, sec. 25, is not a final judgment, and no action will lie upon it. *Anderson v. Young*, Busb., 408. (See Rev. Code, ch. 46, sec. 35.)

104. A term for years in land is liable to a levy and sale by a constable under a justice's execution. *Glenn v. Peters*, Busb., 457. (If the lease be of three years' duration, the constable's levy must now be returned to court as in case of a levy on a freehold. See Rev. Code, ch. 45, sec. 3.)

105. A sealed note for more than sixty dollars, signed by one of two partners, cannot be given in evidence, as "an account stated," by the partner who did not sign it, so as to sustain a warrant against him upon it before a single justice. *Heath v. Gregory*, 1 Jones, 417.

106. Although a person may waive a tort so as to be able to sue in assumpsit in certain cases, yet no new jurisdiction can be thereby acquired, so as to give a single justice the power of trying the case; for the rule is, that where the plaintiff has the election to sue either in tort or contract, no court can have jurisdiction of the action of assumpsit but one which can give a remedy on the tort itself, as the same questions of law arise in each. *Mann v. Kendall*, 2 Jones, 192.

107. Where an account consisted of several items, the aggregate of which exceeded sixty dollars, *it was held* that the plaintiff might omit, or give credit for as many items as he chose, so as to bring the case within the jurisdiction of a single justice, but that this could not be done where there was but a single item, which amounted to more than sixty dollars. *Waldo v. Jolly*, 4 Jones, 173.

108. Under the book debt law, in which the plaintiff has to swear that the account contains a true account of all the dealing, he cannot give a justice jurisdiction by omitting some of the items. *Ibid.*

109. A levy on land, endorsed on a justice's execution and returned to court in the following words, "levied on three tracts of land, containing three hundred acres on Caney Fork," is not sufficiently definite to comply with the requisites of the act of

assembly. Nor can it be made so by proof of facts collateral to the description contained in the levy. *Chastcen v. Phillips*, 4 Jones, 459.

110. Where a justice's judgment is appealed from, and before the appeal is returned to court the parties agree to withdraw it, the judgment is restored. *Mathis v. Bryson*, 4 Jones, 508.

111. A deputy sheriff, having a justice's execution in his hands, levied it on certain articles of personal property, and upon the defendant's land, and sold some of the articles of personal property and properly applied the proceeds, and as to the rest returned that they were not sold for want of bidders, being claimed by different members of the defendant's family. The office of the high sheriff having expired, the deputy as deputy of the new sheriff, before the return day of the execution, made an endorsement on it that the levy was "renewed," and returned it with both endorsements to the county court, where, after notice to the defendants, an order of sale was made, and *it was held* that the order was proper, and a sale under it good. *Tysor v. Short*, 5 Jones, 279.

112. To antedate a credit on a note, so as to reduce the amount of it to a sum within the jurisdiction of a justice, is in evasion of the law, and the jurisdiction may be ousted by a plea in abatement. *Ramsour v. Barrett*, 5 Jones, 409.

113. Where the judgment of a justice is susceptible of two constructions, that is, whether it was intended as a judgment in the defendant's favor on the merits, or, simply, for the costs, as in case of a nonsuit, it is proper to hear evidence in explanation. *Carr v. Woodleff*, 6 Jones, 400.

114. Where the entry made by a justice trying a warrant on a former judgment was, "dismissed at the plaintiff's costs," and in explanation, the justice testified that on the trial before him, the judgment sued on was produced and considered by him, and he believing that it was vacated by the entry of an appeal which he saw on it, made the above mentioned entry, which he intended to be final between the parties; *it was held* that if this testimony were true, it showed that the judgment was on the merits and was conclusive. *Ibid.*

115. An acknowledgment by a person as surety for the stay of a justice's execution, taken by a justice in the absence of the judgment, entered on a separate piece of paper and signed by the proposed surety, is invalid, and no execution can be issued against such person so signing as surety. *Murray v. Edmonston*, 6 Jones, 515.

116. Where a justice's warrant was dated of a certain day, and execution dated of the same day with the warrant, a judgment on the same piece of paper with them, but not dated, *was held* to be sufficiently certain as to the time of its rendition. *Clayton v. Fulp*, 7 Jones, 444.

117. Where A agreed to let B put a saw mill and houses and fixtures on his land for the purpose of sawing lumber, "as long as he wished," he having the right to take away his improvements, *it was held*, that B had an interest for life in the easement on the land necessary to the milling business, determinable, however, sooner at his option, and that his interest in the mill, houses and easement on the land, was not liable to be sold by a constable under an execution from a justice's judgment, without a return of the proceedings to court and an order of sale there made. *Stancel v. Calvert*, 1 Winst., 104.

118. A justice has no jurisdiction of a guaranty. *Johnson v. Olive*, 1 Winst., 215.

See (Assumpsit—When it will or will not lie, 23.) (Constitution—Acts which have been declared constitutional, 5.) (Execution—Purchaser at execution sale, 74-75.) (Guaranty, 17.) (Judgment—Of the effect of a judgment, 8.) (Judgment—Of irregular, void and erroneous judgments, 1-6) (Justices of the Peace—Of Justices' warrants in civil cases, 2.)

V. JUSTICES' EXECUTIONS LEVIED ON LAND AND RETURNED TO COURT.

See (Justices of the Peace—Of their jurisdiction, judgment and execution, 4-5-6-7-8-10-23-43-44-45-49-50-51-55-57-58-59-62-63-64-66-67-71-72-76-77-80-84-89-90-91-98-109-111-117.)

VI. OF THE RESPONSIBILITY OF JUSTICES.

1. A civil action is maintainable against a justice, acting in his office out of court either maliciously, oppressively or corruptly; as, where he *unjustly and maliciously* deprived a party of his appeal. *Hardison v. Jordan*, Conf. Rep., 454, (512.)

2. The justices of the county court are not obliged, by their own exertions, to build and repair jails; they are only bound to use such means for the accomplishment of that end as the law prescribes, *viz*, to lay taxes, appoint commissioners, &c., and for an omission of one or all of these acts, *it seems*, they may be indicted jointly as a body, but the indictment must charge which of the duties prescribed by the act has been omitted; and it is not sufficient to charge generally, that they negligently and unlawfully did permit the jail to go to ruin and decay. *State v. Justices of Lenoir*, 4 Hawks, 194.

3. Under the act of 1790, justices are liable to an action of debt, only where they have not taken any bond from the sheriff; they are not liable when they have committed a mistake honestly in the form of it; but they are liable when guilty of *mala fides* or gross neglect. *Governor v. McAfee*, 2 Dev., 15. (See Rev. Code, ch. 78, sec. 7.)

4. It is gross negligence in the justices of the county court to take from their clerk, as a bond, an instrument having no sum of money inserted in the body; and they will be liable therefor, as if they had taken no bond. *State Bank v. Davenport*, 2 Dev. and Bat., 45.

5. The justices of the county court may be proceeded against in a summary manner, under the act of 1819, as the sureties of their clerk, for permitting him to officiate as clerk, without giving bond, as prescribed in the act of 1790 and 1809. *Ibid.* (See Rev. Code, ch. 78, secs. 5 and 7.)

6. Whether in granting an appeal and accepting the security which the law requires, a justice does not act in a judicial character, and on a matter *within his jurisdiction, quere*. If he do, then no action can be sustained against him for taking insufficient security; for no action can be supported against a judge or justice, acting judicially and within the sphere of his jurisdiction, however erroneous his decision, or malicious the motive imputed to him. But if he do not, he is still not liable, if he acted *bona fide*, and according to his best information. *Cunningham v. Dilliard*, 4 Dev. and Bat., 351.

7. Where a justice, in good faith and to preserve order, directed by parol the sheriff to take into his custody and tie a person who interrupted and insulted him in a disorderly manner, while he was officially engaged, *it was held* that he was not liable to an action therefor. *Furr v. Moss*, 7 Jones, 525.

8. The justices of a county are not responsible to the owner of property, for injuries to it caused by defects in the public bridges in their county. *Kinsey v. Justices of Jones*, 8 Jones, 186.

See (Limitations—When the statute will or will not bar, 25.) (Indictment—When an indictment will lie, 37.) (Indictment—Form and matters relating thereto, 97–153.)

LANDLORD AND TENANT.

1. A landlord has no power to distrain for rent in this state, the process of distress having never been adopted here. *Dalglish v. Grandy*, Conf. Rep., 22, (161.)

2. A lessor, who parts with the reversion, cannot recover rent accruing subsequently. *Markland v. Crump*, 1 Dev. and Bat., 94.

3. The distinction between an assignment and an under-lease depends solely upon the quantity of interest which passes, and not upon the extent of the premises transferred. When, therefore, the lessee of a house for seven years demises *part* of the house to another for the *whole* of his term, it is not an under-

lease, but an assignment *pro tanto*. *Lunsford v. Alexander*, 4 Dev. and Bat., 40.

4. A landlord has no lien on the crop of his tenant for his rent, though it may be reserved in kind, or in part of the crop. Whether such an agreement is contained in, or is out of, the lease, the lessor stands upon no better footing than the other creditors of the lessee. *Deaver v. Rice*, 4 Dev. and Bat., 431. (Such kinds of rent are now exempt from execution against the lessee, except for taxes. See Rev. Code, ch. 63, sec. 1.)

5. Upon a lease for a year, the lessee acquires an estate in possession in severalty during the term, so that the crops growing or standing on the land are entirely his property; and if an execution in favor of a third person be issued against the tenant during the year, it will bind the crop from its *teste*, so that he cannot afterwards sell it to another, or assign it, or any part of it, to his landlord in payment of his rent. *Ibid.* (See the reference in the note to the last section.)

6. As to the land, the particular tenant holding over stands towards the remainderman as a tenant towards his landlord. But the idea of such tenancy does not belong to the ownership of distinct successive estates in personal chattels, and not arising out of any contract between the parties. *Montgomery v. Wynns*, 4 Dev. and Bat., 527.

7. If a landlord during the continuance of the lease, and before the rent becomes due, convey the land to the lessee in fee, the rent will be extinguished. Therefore, where a guardian rented out land but took no bond or other security to himself for the rent, and before the rent became due the ward came of age and conveyed the land in fee to the lessee, *it was held* that the rent, being incidental to the reversion, was extinguished by the conveyance of that reversion to the lessee. *Mixon v. Coffield*, 2 Ired., 301.

8. A tenant, who is about to remove, has a right, where there is no covenant or custom to the contrary, to all the manure made by him on the farm; it is his personal property and he may take it with him. But it ceases to be his, if he leave it when he quits the farm. *Smithwick v. Ellison*, 2 Ired., 326.

9. The tenant may rake the manure into heaps, and the taking the slight portion of earth, which will be necessarily mixed with it in the process, will not make him a *tortfeasor*. *Ibid.*

10. Where a lease was given upon condition that the lessee, at the end of each year, should give bond and security for the rent of the succeeding year, and at the expiration of one year the lessee failed to give such bond and security, but the lessor was absent and did not demand it, *it was held* that no forfeiture was incurred, it being the duty of the lessor to make the demand. *Tate v. Crowson*, 6 Ired., 65.

11. The law leans against forfeitures; and when the agency

of the landlord is involved in any way in the act, which is to work or prevent a forfeiture, he ought so to act, as to make it appear clearly that he means to insist on the forfeiture. *Ibid.*

12. The lessee should not be punished without a wilful default, which cannot be made to appear, unless an actual demand be proved, and that it was not answered. *Ibid.*

13. In an action for use and occupation, where it appeared that one P. had leased the premises to the defendant for the year 1844, that in the latter part of that year he, with the knowledge and consent of the defendant, rented the same to the plaintiff for the year 1845, who leased a part of the same premises to the defendant, who occupied and held it under the plaintiff, *it was held*, that if this were a case in which attornment was necessary, the defendant had attorned, and at all events, he was liable to the plaintiff for the rent. *Cooke v. Norriss*, 7 Ired., 213.

14. In the case just above stated, the defendant abandoned the premises before the end of the year 1845, and no specific contract being proved as to the time he should enjoy the premises, which were a wharf and warehouse in a commercial town, *it was held*, to be proper to leave the question, as one of fact for the jury, for what time the parties intended that the lease should continue, and that the court could not say that the lease continued until the end of the year. *Ibid.*

15. In an action upon a covenant for rent contained in a lease, it is competent for the defendant to show that, at the time of its being made, the plaintiff had no title to the land; provided he can show at the same time that, in consequence thereof, he could not enter, or that having entered he was evicted by a paramount title. *Snead v. Jenkins*, 8 Ired., 27.

16. In every plea of eviction there must not only be an averment that the plaintiff had no title, but also that in consequence thereof the lessee was evicted; as the defence depends upon both. *Ibid.*

17. Where A rents out land belonging to B, the latter cannot recover against the lessee upon a count on the agreement for rent of the land, because there was no privity between the lessee and B, unless B can show A acted as his agent. And for the same reason B cannot sustain a count upon an implied assumpsit against the lessee, there being no privity between them, and there being an express contract between the lessee and A. *Hardy v. Williams*, 9 Ired., 177.

18. What notice to quit is required from a landlord to a tenant in this state, *quaere*. *Phelps v. Long*, 9 Ired., 226.

19. Where a lease is made and it is agreed that the rent is to be paid in a part of the crop, the contract is executory, and the title to the crop made is in the lessee until the lessor's part is separated and allotted to him, and, therefore, before that time, the lessor has no right to take possession of any part of the crop,

without the consent of the lessee. *Ross v. Swaringer*, 9 Ired., 481.

20. Where a person agrees to work on the land of another for a share of the crop, the cropper cannot convey a legal title to his share of the crop to a third person, before an actual division and appropriation. And the owner of the land, who made the contract, is not estopped to deny the right of such assignee to recover at law. *McNeeley v. Hart*, 10 Ired., 63.

21. A cropper has no such interest in the crop, as can be subjected to the payment of his debts while it remains in mass, for, until a division, the whole is the property of the landlord. *Brazier v. Ansley*, 11 Ired., 12.

22. Where the owner of land, to which a ferry is annexed as a franchise, leases the land together with the ferry, he is not responsible for any damage sustained by a third person, from the mismanagement of the ferry while in possession of the lessee. *Biggs v. Ferrell*, 12 Ired., 1.

23. Where there is a lease of a house, and a person lives in it by an assignment or underletting from the lessee, or by her license merely and at her will, he is concluded from questioning the lessor's title; for he came in under him, and cannot withhold the possession, when the term has expired or been legally surrendered. *Kluge v. Lachenour*, 12 Ired., 180.

24. A contract was as follows: A was to cultivate a plantation belonging to B, in the year 1849, and was to furnish the means and materials to make the crop, as far as he was able, and such as were not furnished by him were to be furnished by B. At the end of the year B was to sell the crop and have one-third, and then deduct all the expenses and pay the residue to A; and *it was held* that this was not a leasing of the land by the one party to the other, nor the case of hiring a laborer by the owner of the land; but the parties were joint owners of the crop; and B having survived A had a right to the property as joint owner, in order to dispose of it according to the contract. *Moore v. Spruill*, 13 Ired., 55.

25. Turpentine trees are the subject of lease. *Rooks v. Moore*, Busb., 1.

26. Where A demised to B in writing a tract of land, and excepted thereout a certain lot, reciting that one-half thereof he had in writing devised to J. S. (and which had been surrendered by J. S.) and the other half he had by parol agreed to lease to J. D., to whom, after the said lease to B, he demised in writing the entire excepted lot; *it was held* that the excepted lot did not pass in the demise to B, even though the recitals were false, and that B could not recover it from one claiming under J. D. *Hargrove v. Miller*, Busb., 68.

27. Where the forfeiture of a lease is incurred by the non-payment of rent, if the landlord receives from the lessee rent subse-

quently accruing, the forfeiture is thereby waived. *Richbury v. Bartley*, Busb., 418.

28. Where the lessee of a lot for a term of years covenanted that he would not remove from the lot any building, which he might put thereon, until the rent was paid, and a building put thereon by him during such lease was removed by a third person with the consent of the lessee, the rent being unpaid, *it was held* that such third person was liable in damages to the lessor for such removal; and that the lessee was a competent witness for the lessor against such third person. *Forbes v. Williams*, 1 Jones, 393.

29. An agreement between A and B, that B shall cultivate the turpentine trees, that is, make and save turpentine on the land where A lives for one year, A giving him half of the turpentine, &c., he may save for his labor, &c., is not a lease of the land or of the pine trees to B, and he, therefore, cannot maintain trespass *quare clausum fregit* against a person who enters and collects turpentine from the trees. *Denton v. Strickland*, 3 Jones, 61.

30. Where a person had rented a place to another to make a crop, of which the parties were each to have a half, and the owner of the land was to furnish a horse, *it was held* that a tenancy was created, and that the tenant might bring trespass *quare clausum fregit* against his landlord for an unlawful entry. *Hatchell v. Kimbrough*, 4 Jones, 163.

31. Where a paper writing was executed by the owner of land, acknowledging the receipt of a certain bond for money in payment for the "purchase of cypress timber" on the land, with a further agreement to let the purchaser have a certain number of years "to cut the timber off of the land," *it was held* that it created a lease for years, so as to enable the purchaser, or his assignee, to occupy the land and take the cypress timber for the time stated in the paper writing. *Moring v. Ward*, 5 Jones, 272.

32. The act of 1824, by which the long terms for years, created by the Tuscarora Indians, are, for certain purposes, made real estate, has no effect upon the reversions expectant on those terms. *Burnett v. Thompson*, 6 Jones, 210, S. C. and S. P. 7 Jones, 407.

33. Where a tenant entered into the occupation of a room in a warehouse, under an express lease from month to month, and he continued the occupation for more than two years, he cannot be considered as a tenant from year to year, and thus be entitled to a six months' notice to quit. *Jones v. Willis*, 8 Jones, 430.

34. *Quære*, as to what notice to quit a tenant from month to month is entitled. *Ibid.*

See (Assumpsit, 4-19-39.) (Ejectment—Of the defence and herein of the consent rule, 20-21-31-33-34-35-39-40-41.) (Estoppel—By matter other than by record or deed, 3-6-8-14-15-17-18-21-22-23-29-30-31-35.) (Registration, 20-25-26.) (Surrender.)

LARCENY.

1. The judges were equally divided upon the question, whether a borrowing, with intent to steal, will support a charge for larceny—Is a trespass in the taking an essential ingredient in the offence?—*State v. Long*, 1 Hay., 154, (177.)

2. Larceny may be committed in stealing a slave: therefore, in an indictment under the act of 1799 for stealing a slave, it is not necessary to add “with the intention to sell or to dispose of to another, or to appropriate to his own use,” as that is implied in the charge of stealing. *State v. Hall*, Tay., 126, (76.) S. C., 2 Hay., 105, (265.) (See Rev. Code, ch. 34, sec. 10.)

3. A person cannot be convicted on an indictment for stealing that which has neither an intrinsic nor artificial value, as, for instance, “one half ten shilling bill of the currency of the State.” *State v. Bryant*, 2 Car. L. R., 269, (249.)

4. A person may be convicted for stealing a runaway slave, knowing him to be a runaway, and to whom he belonged. *State v. Davis*, 2 Car. L. R., 291, (271.)

5. Larceny cannot be committed unless the thing be taken against the will of the owner. Hence if the thing be sent by the owner, for the purpose of entrapping the taker, it will not be larceny. *Dodd v. Hamilton*, N. C. Term, R., 31, (471.)

6. Larceny or seduction under the act of 1779 cannot be committed of a slave, where the owner, through his agent, consents to the taking and asportation, though such consent was given for the purpose of apprehending the felon; but when the defendants bring a slave to a particular place, after such assent of the owner, but in pursuance of a plan matured before the assent given, if the jury are satisfied that both defendants were privy to the felony and equally concerned, they may properly convict them. *State v. Jernagan*, N. C. Term, 44, (483.) (For the present law on the subject, see Rev. Code, ch. 34, sec. 10.)

7. One who procures or instigates a petty larceny to be committed is a principal. *State v. Barden*, 1 Dev., 518.

8. Where a shawl was dropped in an exhibition room, and picked up by the defendant, placed in a conspicuous situation, and afterwards clandestinely appropriated to his own use, it was held that he was guilty of larceny. *State v. Roper*, 3 Dev., 473.

9. In an indictment for grand larceny, one cannot be convicted as a principal, unless he were actually or constructively present at the taking and carrying away of the goods. His previous assent to, or procurement of, the caption and asportation, will not make him a principal; nor will his subsequent reception of the thing stolen, or his aiding in concealing or disposing of it, have that effect. *State v. Hardin*, 2 Dev. and Bat., 407.

10. Where one got staves upon the land of another, upon con-

tract to have half for getting them, *it was held* that, while they remained on the land undivided, the manufacturer was neither a tenant in common with the owner of the land, nor a bailee of the staves; and that, therefore, he, or any other person with his connivance, might be guilty of larceny in taking them. *State v. Jones*, 2 Dev. and Bat., 544.

11. Where one labors upon the farm of another upon an agreement to have a share of the crop, the property in the entire crop remains in the employer, before the share of the laborer is separated from the general mass. *Ibid.*

12. The presumption that he who is found in the possession of stolen goods, recently after the theft was committed, is himself the thief, applies *only* when this possession is of a kind which manifests that the stolen goods have come to the possessor *by his own act*, or, at all events, *with his undoubted concurrence*. *State v. Smith*, 2 Ired., 402.

13. Where the defendant, and two of his sons who lived with him, were indicted for stealing tobacco, and the tobacco, which was stolen in the night, was found the next day in an outhouse of the defendant, occupied by one of his negroes, and in which he kept tobacco of his own, and the tobacco so found was claimed by him as his own, though proved to be the tobacco that was stolen, *it was held* to be error to charge "that the possession of the stolen tobacco, *thus* found in the defendant's possession, raised, in law, a strong presumption of his guilt. *Ibid.*

14. In an indictment for larceny, when the property stolen is alleged to be the property of A B, and that the defendant "did feloniously steal, take and carry away the said property," it is a sufficient description of the offence, without saying that the property was actually in the possession of A B, or that it was actually taken out of his possession, the law implying his possession from his ownership. *State v. Gallimore*, 7 Ired., 147.

15. An indictment for stealing a hog is well supported by showing that the defendant stole a shoat. *State v. Gadet*, 7 Ired., 210.

16. Where an indictment alleges the property stolen to be the property of *Elizabeth M.*, and the evidence shows it was the property of a woman called *Betsey M.*, it must be left to the jury to decide, whether the person so described was known by both names. *Ibid.*

17. In an indictment for larceny, the christian and surname of the party injured, if known, must be stated, and the name so stated must be either the real name, or that by which he is usually known; as either is sufficient. *Ibid.*

18. In an indictment for larceny the goods alleged to be stolen may be described by the names, by which they are known in trade, and the same principle extends to articles known by particular names in all the arts, pursuits and employments of life. *State v. Clark*, 8 Ired., 226.

19. Where a man was indicted for stealing a "bull tongue," and it appeared in evidence that he had stolen a particular kind of plough share, usually known in the neighborhood in which he resided by that name, *it was held* that the allegation of the indictment was well supported by the evidence. *Ibid.*

20. An indictment will lie under the statute, for feloniously taking and carrying away a runaway slave "with intent to dispose of him to another," &c., even though the taker did not know who was the owner of the slave. *State v. Williams*, 9 Ired., 140.

21. The possession of a stolen thing is evidence to some extent, against the possessor, of a taking by him. Ordinarily, it is stronger or weaker in proportion to the period intervening between the stealing and the finding in the possession of the accused; and after the lapse of a considerable time, before a possession by the accused is shown, the law does not infer his guilt, but leaves that question to the jury under all the circumstances of the case. *Ibid.*

22. An indictment under the statute for the abduction of slaves, which charges that the defendant "by violence feloniously took," is as good as if it had averred that the defendant "feloniously by violence took," &c. *Ibid.*

23. In an indictment relating to the larceny or abduction of a slave, in describing him as the property of A. B., he may be said to be "the property of A. B.," or of the goods and chattels of A. B., after laying the value of the slave. *Ibid.*

24. In such an indictment, the words "with an intent to sell and dispose of the said slave" are sufficient. *Ibid.*

25. Turpentine, which has run out of the trees into boxes cut into the tree for the purpose of receiving the liquid, is the subject of larceny. But to support an indictment for stealing two barrels of turpentine, it must appear that the turpentine was in barrels when it was stolen, not that it was dipt from the boxes in small quantities from time to time, and then deposited in barrels. *State v. Moore*, 11 Ired., 70.

26. To constitute a capital felony in the case of stealing, &c., slaves, the taking and conveying away of the slave must be from the possession of the owner. The felony is not created by our statutes when, before the taking or carrying away, the owner has lost the possession of the slave by the act of another, even though such an act was procured to be done by the person charged with the felony, for a felonious purpose. Neither the act of 1779, Rev. Stat., ch. 34, sec. 10, nor the act of 1848, ch. 35, constitutes a felony in such a case. *State v. Martin*, 12 Ired., 157. (The law is now altered. See Revised Code, ch. 34, sec. 10.)

27. Under an indictment for stealing and carrying away a slave under the act, Rev. Stat., ch. 34, sec. 10, the venue must be laid; and the prisoner tried, in the county where the original fe-

lonious caption took place. *State v. Graves*, Busb., 191. (See Rev. Code, ch. 34, sec. 10.)

28. The act of 1852, ch. 87, concerning the stealing of slaves, is not a repeal of the act, Rev. Stat. ch. 34, sec. 10, on that subject. *State v. Hester*, 2 Jones, 83. (See Rev. Code, ch. 34, sec. 10.)

29. Acts, which would constitute one an aider or abettor in grand larceny, would make him a principal in petty larceny. *State v. Shaw*, 4 Jones, 440. (The distinction between grand and petty larceny is now abolished; see Rev. Code, ch. 34, sec. 26.)

30. An indictment for larceny charging, in one count, the thing stolen to be "a certain writ of *fi. fa.* belonging to the superior court," in another count, "a certain process of and belonging to the superior court," and in a third "a certain record of and belonging to the superior court," is too vague and indefinite to be supported. *State v. McLeod*, 5 Jones, 318.

31. Where the prosecutor lost a carpet bag on the public highway, and directed a person to get it for him, which he did as the prosecutor's bailee, but afterwards concealed the article and denied that he had it, *it was held* that this was only a breach of trust, and not a larceny. *State v. England*, 8 Jones, 399.

32. *It seems*, that if, in the case just above stated, the bailee had opened the bag, and taken out some of the articles contained in it, *animo furandi*, it would have been a larceny. *Ibid.*

33. An indictment under the Revised Code, ch. 34, sec. 20, for stealing a bank note of a certain denomination and value, without setting forth by what authority the bank note was issued, cannot be sustained. *State v. Brown*, 8 Jones, 443.

See (Accessory, 3.) (Indictment—In what cases an indictment will lie, 1-4.) (Indictment—Form and matters relating thereto, 5-19-49-52-73.) (Indictment—Of the trial, verdict and judgment, 16-85-106.) (Indictment—Plea of former acquittal or conviction, 3.) (Indictment—Of quashing indictments, 3.) (Indictment—Variance between the allegations and proof, 9.) (Evidence—In criminal proceedings and indictments, 4-27-46-47-56-92-99-121.)

LEASE.

See (Landlord and Tenant.)

LEGACY.

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| <p>I. Construction, as to what passes and who takes.</p> <p>II. Whether vested, contingent or executory.</p> <p>III. Of the assent of the executor, and its effect.</p> | <p>IV. When a legacy will be presumed to have been paid or satisfied.</p> <p>V. Legacy "after debts paid," what fund liable for them.</p> <p>VI. For the separate use of a married woman.</p> <p>VII. Lapsed, void and adeemed legacies.</p> |
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I. CONSTRUCTION AS TO WHAT PASSES AND WHO TAKES.

1. A bequest as follows: "I give all the rest of my negroes and their increase to be equally divided among my children, the survivor or survivors of them, and their heirs forever," *was held* to vest in the children at the death of the testator; and, upon the successive deaths of two of them, their respective shares were distributed between his, or her, mother and brothers and sisters. *Gorham v. —*, Mar., 52, (49.)

2. The word "heirs," when used in a will of personalty, is a word of limitation always, and vests the absolute property. *Cutlar v. Cutlar*, 2 Hay., 154, (334.)

3. A bequest of a negro "and also" of lands, for life, passes only a life estate in the negro by force of the words "and also." *Anonymous*, 2 Hay., 161, (346.)

4. If a bequest of a female slave be to A, and her future increase to B and others, the increase born after the death of the testator will go to B and the other legatees. *Mullington v. Shipman*, Conf. Rep., 113, (243.)

5. The children of a female slave who is specifically bequeathed, which are born after the making of the will and before the death of the testator, do not go with the mother, but pass to the residuary legatee. *Jones v. Jones*, Conf. Rep., 310, (396.) (Altered by Rev. Code, ch. 119, sec. 27.)

6. Where a slave was given "to A for life, and after his death to his son B and his heirs, and in default of his issue to his brothers and sisters then living," *it was held* that "then" was used as an adverb of time, and pointed to the default of issue at the death of B, and that therefore the limitation over was good. *Moreland v. Moreland*, 1 Murph., 48. S. C. 2 Hay., 375, (573.)

7. A gives his estate to his daughter, and if she "dies without having heirs" then over; the limitation over is too remote, and the whole interest vests in the daughter. *Bryson v. Davidson*, 1 Murph., 143.

8. A gave all his estate to be equally divided between B, C, D, E's heirs and F, *held* that the division was to be made *per capita*, by which each of E's children took an equal share with

B and the other legatees. *Whitehurst v. Pritchard*, 1 Murph., 383.

9. Where a testator bequeathed to his wife "two negroes, during her natural life, and one half the tract of land I now live on, during her natural life, and then to return to my son W," *it was held* that the limitation to the son was confined to the land, and the remainder in the negroes was undisposed of. *Sneed v. Harris*, N. C. Term R., 240, (672.)

10. A legacy of a slave to a wife for life, and then to be emancipated (in a way not allowed by law) does not vest in the wife any greater interest than what is expressed, to wit, for life, and after her death the executors may recover them, in an action of detinue, from her legatee. *James v. Masters*, 3 Murph., 110.

11. Where one put a female slave in the possession of another, and, by his will subsequently made, bequeathed that slave to the same person for life, and proceeded, "after her death I give the same slave and her increase to" &c., *it was held* that the issue of the slave, born between the date of the will and the death of the testator, did not pass to the legatee for life. *Powell v. Cook*, 4 Dev., 499.

12. Where a testator, by one clause of his will, gave his daughter two slaves absolutely, and by a subsequent clause gave her another, and proceeded as follows: "which negro, together with those I formerly lent to her, to be divided between her children," *it was held* that parol evidence that the slaves mentioned in the first clause had, before the making of the will, been lent by the testator to his daughter, was admissible, and that fact being established, that the second clause reduced her property in them to an estate for life, with remainder to her children. *Morton v. Edwards*, 4 Dev., 507.

13. A bequest to a son "of every article I have already possessed him with," will not, by the mere force of these words, pass a slave, which the testator erroneously supposed he had emancipated, and which he had placed with the son for protection only; and in such case, whether it was the testator's intention to pass the slave, is a question of fact. *White v. White*, 1 Dev. and Bat., 260.

14. Where a testator bequeathed certain slaves to the children of his daughter, and expressed his wish that his son-in-law should not have "the use or control" of said slaves, and then subjoined, "but if she survives him, then my said daughter may have the use of the said slaves during her widowhood," *it was held* that the daughter did not take a legal estate in the slaves, upon which an action at law could be sustained, but that her interest was only an equitable one, and could be protected only in a court of equity. *Bennett v. Williamson*, 1 Dev. and Bat., 282.

15. A bequest by a testator to his wife of "a girl named Hannah, and my horses, &c., and my plantation, with all the lands

adjoining to it, during her lifetime," passes but a life estate in the negro girl. *Black v. Ray*, 1 Dev. and Bat., 334.

16. A bequest by a testator to his wife in the following words: "I wish her to get Stanford in her third of the property if she chooses," is not a specific legacy of the slave to the wife, but only gives her a right to take him at a fair valuation, and, if that valuation be more than her share, she must account for the surplus. *Young v. Carson*, 1 Dev. and Bat., 360.

17. A direction that the testator's infant grandchildren shall be "raised" and "taken care of" and "educated" creates a charge upon the estate for such raising and education during their minority. *Cloud v. Martin*, 1 Dev. and Bat., 397.

18. Where a testator bequeathed Nell, a female slave, to his "wife during her natural life or widowhood," and in a subsequent clause of his will provided that the slave should become the property of his "daughters A and B, at their mother's death, or at the time that his son Thomas arrives at sixteen years of age, and her increase, if any before that time, to be equally divided between the rest of his children." "If the widowhood of my wife should terminate before her natural life, Nell shall remain in this place for the support of my children, who shall live here." *It was held* that the increase, born after the arrival of Thomas at the age of sixteen years, but before the death of the widow, would belong, after the death of the widow, to A and B; particularly as that construction would harmonize with the rest of the will, which seemed to aim at an equal distribution of the testator's property among his children. *Gibbons v. Dunn*, 1 Dev. and Bat., 446.

19. The state of the testator's family, at the time of making his will, may be attended to in settling its construction. The whole will may also be examined, and the state of the property looked at, if it appear on the face of the will; not if it be *dehors*, unless to explain a latent ambiguity. *Ibid.*

20. A residuary clause in a will, by which all the remainder of the testator's real and personal estate was directed to be sold by his executors, will not pass slaves which he had given to a child prior to 1806, but which he had subsequently obtained possession of, and held as bailee until his death, nor will it authorize the sale of the said slaves by the executors, so as to defeat the title of the donee under the act of 1784. *Bell v. Culpepper*, 2 Dev. and Bat., 18.

21. Where a legacy is given to a described class of individuals, as to the children of A. B., and no period is assigned for the division, the persons answering the description at the death of the testator, that is, the children of A. B. then born, or in *ventre sa mere*, are alone entitled under the bequest. But when the enjoyment of the legacy is postponed to a particular time, as to the death of A. B., then, unless there be in the will indications

of a different intent, not only those who answer in the description at the death of the testator, but those who are born after his death, and before the period of division, are all entitled to take; and if any, who are thus entitled to take, die before the period of distribution, and there are no words in the will indicating an ulterior disposition of their interests, as to the survivors, they are vested interests, and are transmitted to their representatives. *Knight v. Wall*, 2 Dev. and Bat., 125.

22. A bequest by a testator of a negro girl and her increase to his daughter for life, and after her death, that "the girl shall go to the children of his daughter," will carry the increase of the girl, as well as the girl herself, to the children after the mother's death, unless it appear from other parts of the will that the testator intended otherwise. *Ibid.*

23. Where a testator bequeathed his negro woman Dice to his daughter Betsey, and added, "the first born of Dice that is living hereafter to fall to M. S.," it was held that the intention of the testator was to give to M. S. the first child that should be born alive after the time he was speaking, to wit, the date of the will, and that she would take such first born child whether born in the life time of the testator, or after his death. *Pearson v. Taylor*, 4 Dev. and Bat., 60.

24. Where a testator, after leaving all his slaves to his wife for life, and giving to his son, after his wife's death, a negro woman named Luck, bequeathed to his daughter as follows: "After my wife's decease, I give to my daughter, M. M. C., one negro boy, and if my negro woman Luck should have another child, I give it to my daughter M. M. C.;" and after the testator's death, and during the life of his widow, Luck had two children, of whom the elder died in the lifetime of the widow, and the other survived her, it was held, that by the bequest only one, and that the first born child of Luck, was given to the daughter; that in such first born child she took a vested interest immediately upon the death of the testator; and that although such child died in the lifetime of the widow, yet the daughter had no title, upon the death of the widow, to the other child of Luck, which was then living. *Conner v. Satchwell*, 4 Dev. and Bat., 72.

25. Where a testator, in one clause of his will, lends to his wife all his estate, real and personal, for life, and in a subsequent clause provides, that after the death of his wife his son shall have a particular negro woman, but that her second born child, after that time, shall be given to his grandson, it seems that the widow takes a life estate in the child. *White v. White*, 4 Dev. and Bat., 401.

26. A bequest of slaves to the testator's daughter, "for her use and benefit during her natural life, and then to descend to the heirs of her body, if any, if not any heirs, then to her lawful

heirs," gives her the whole and absolute interest in the slaves. *Floyd v. Thompson*, 4 Dev. and Bat., 478.

27. Where a testator, after giving certain legacies to his children, and directing that the residue of his estate should be equally divided between them, upon their accounting for the advancements which they had received, added, "this direction is not to apply in case a negro given or lent shall die before me, that being my loss; but where any of the said negroes shall have been sold, or suffered to be sold, they shall be charged at their value at the period of such sale, except in case of my grandson T., son of my deceased son, G. B., who is to pay to my executors \$500 in full of all advancements made to him or to his father," *it was held* that the grandson was bound to account for only the sum of \$500, and not for that sum in addition to the value of two negroes which had been given to his father and sold by him, and that no parol evidence could be received to show, that the testator intended his grandson to account for the \$500 in addition to the value of the said negroes given to his father. *Blacknall v. Wyche*, 1 Ired., 94.

28. Where a testator, who had, upon the marriage of his daughter E., placed a negro woman, Fanny, in her possession, bequeathed as follows: "I lend unto my daughter, E., two negroes named Fanny and Luke, during her natural life, and their increase. Fanny is now in her possession, Luke she is to receive after my decease, and if she should never have a lawful heir begotten of her own body, for them and their increase to be returned to my five children," &c. *It was held* that the children of Fanny, born whilst she was in the possession of his daughter and her husband, but before the death of the testator, passed under the bequest to the daughter. *Hurdle v. Elliott*, 1 Ired., 174.

29. A testator, after bequeathing certain negroes to his wife for life, or during widowhood, bequeathed as follows: "I wish for the negroes lent to my wife, if they do not behave, to be hired out. I also wish for all the negroes not given to be hired out as soon as they will bring anything. And after the death of my wife, or marriage, I want all my property, not given away, to be equally divided among my girls." The negro, for which this action was brought, was one of those directed to be hired out. *Held*, that the daughters had only an interest in remainder after the death or marriage of the widow, and that, therefore, the plaintiff, who claimed under a conveyance from the husband of one of the daughters, could not bring trover for the negro during the lifetime of the widow, or while she remained unmarried. *Smithwick v. Biggs*, 1 Ired., 281.

30. Where the surplus of an estate is left by will, to be equally divided "between the heirs of A. B. and the heirs of C. D." the

children, or heirs, of A. B. and C. D. will take *per capita* and not *per stirpes*. *Hobbs v. Craige*, 1 Ired., 332.

31. Where a testator bequeathed as follows: "I bequeath unto my wife, Susanna, all my estate and effects remaining in my executor's hands after all my just debts are paid, the said property to be and remain my beloved wife's during her natural life; she is not allowed to sell nor dispose of said effects in any shape whatever, agreeable to this my last will, with the exception of a negro boy child by the name of Larkin. I then further will, that at the decease of my wife, Susanna, command my executors to make an equal distribution of my said property between my five lawful heirs;" and nothing further was said about Larkin, *it was held*, that the absolute interest in the boy Larkin passed to the widow, Susanna. *Matthis v. Rhea*, 1 Ired., 394.

32. Where a testator bequeathes a negro woman and *her increase*, and there are no other words in the will to explain his meaning, only the increase born after the death of the testator will pass. *Cole v. Cole*, 1 Ired., 460. (Increase born between the date of the will and the death of the testator will now pass, unless a contrary intent appear in the will, see Rev. Code, ch. 119, sec. 27.)

33. A testator bequeathed as follows: "I hereunto confirm the property I have heretofore given to my daughter Susan, and one dollar to her, her heirs and assigns forever." Under this bequest a negro girl named Fan was claimed; and it was proved that Fan's mother had been called in the family Susan's negro; that when Susan married, this mother had been sent home with her and remained with her some time, and was afterwards taken back by the testator and continued with him till his death, claimed by him as his own; that the testator had quarrelled with Susan's husband; and, besides the mother of Fan, some articles of household furniture had been sent home with Susan, which had never been reclaimed. It also appeared that in similar bequests to his other children, four in number, he not only gave them in general terms the property he had before given them, but added "including the negroes," (naming them.) *Held* that the testator did not intend by this bequest to give any negro to his daughter Susan. *Kinsey v. Rhem*, 2 Ired., 192.

34. Parol evidence cannot be admitted to add to, subtract from, or modify a testamentary disposition, but it is properly admissible to identify the things therein described. *Ibid.*

35. A bequest of personalty to A for life, and at his death, "if he should die leaving heirs lawfully begotten of his body, that the said property shall be equally divided between them," is a limitation for life only to A, with remainder to his children as tenants in common. *Swain v. Rascoe*, 3 Ired., 200.

36. The general rule in such cases as the last is, that wherever words in a will would create an estate tail in land devised,

the same words in a bequest of chattels will carry the absolute estate; but an exception to this rule is, where farther words of limitation have been superadded, as "executors, administrators and assigns," or the words "equally to be divided," and the like. *Ibid.*

37. Where a testator bequeathed as follows: "I lend to my daughter, B. G., one negro woman and her increase that she may hereafter have," *it was held* that the bequest was not void for uncertainty, but that the legatee, in order to identify the woman, might show that the testator had bequeathed all the negro women he had, except one, specifically by name to other legatees, and that the one not named in the will passed under the above bequest. *Lillard v. Reynolds*, 3 Ired., 366.

38. Where a father had in his life time made gifts to several of his children, of which gifts some were perfect and others not strictly according to law, and then by his will bequeaths property specifically to each of his children, indicating an intention to make an equal distribution among them, referring to and taking into consideration what he had before given them, *it was held* that the will ratified and confirmed all the previous gifts, including certain slaves put into the possession of one of his daughters upon her marriage. *Simpson v. Boswell*, 5 Ired., 49.

39. A testator bequeathed as follows: "I do lend to B's four children, C, D, E and F, all my estate, real and personal," and then directed that the estate should be kept together until C arrives at twenty-one years, and then to be equally divided among the children, to them, their heirs and assigns forever, *it was held* that the word "lend" did not tie up the estate to the death of the children. *Cox v. Marks*, 5 Ired., 361.

40. A testator, having advanced to his five children by his first wife property, which he valued at \$2,000 for each, directed by his will that certain persons, to be appointed commissioners by the county court, should, upon the marriage of any of his children by his last wife, advance them property not to exceed \$2,000 for each, so that upon a final division there should be equality among all his children. All the valuations were to be made upon the same scale or principle. *It was held* that the commissioners, appointed by the county court, did right in fixing the valuation for the younger children at \$2,000 each, at the time the allotment was made. *Mayo v. Mayo*, 6 Ired., 84.

41. Where a testator, after sundry devises and bequests, added, "all the remainder of my estate I leave to my wife, to be divided among my children as she thinks proper," and she was appointed executrix of the will, *it was held* that no beneficial interest passed to her in the remainder thus disposed of, but she only took it in trust for the benefit of her children and to be divided among them. *Green v. Collins*, 6 Ired., 139.

42. Where a testator, who had put a woman slave, named P,

into the possession of his daughter, during which time she had two children, and then took her back when she had another child, bequeathed as follows: "I give to my daughter all the property I have heretofore possessed her with, except negro woman P, which I lend to her during her life, and after her death, the negro woman P and all her increase to be equally divided among my daughter's children," and the executor assented to the legacy, *it was held* that, after the daughter's death, the children could not recover any of these negroes by petition; *first*, because, as to the negro woman P, the legal estate had vested in them, and they might recover in an action at law; *secondly*, because, as to the issue of P born before the testator's death, they did not pass under the will to the children of the testator's daughter. *Hurdle v. Reddick*, 7 Ired., 87.

43. "Increase" in the bequest of a female slave means only the increase born after the testator's death, unless there be an apparent intent to include issue born after the making of the will, or even before, by words of reference to a period from which the birth of the issue, that is to pass, shall be counted. *Ibid.* (Issue, born before the testator's death, will now pass, unless a contrary intent appear by the will. See Rev. Code, ch. 119, sec. 27.)

44. A testator gave to his wife by will, during her life or widowhood, all his estate except what he should otherwise dispose of. He then gave to his children certain property to be *theirs* at his decease, and added the following clause: "Also, at the decease of my wife, I give to my son, G., my man Stephen, and to my son, L., my man Charles. Also, I give to my son, L. W., all my lands, &c., (in which he had previously given his wife a life estate.) Also, unto my son L. W., I give my two boys Dick and David with their mother." *It was held* that these negroes did not pass immediately to L. W., but only in remainder after the death or marriage of the widow. *Sherrill v. Echard*, 7 Ired., 161.

45. A testator bequeathed as follows: "I give unto my daughter E. C. during her natural life, at the end of which to the only heirs of her body, one negro girl, Riah, this to the aforementioned to them and their heirs forever," *it was held* that as this disposition, if applied to land, would have created an estate tail, it gave the absolute property in the slave to E. C., there being nothing in the other parts of the will to show that the words "heirs of the body" meant children. *Coon v. Rice*, 7 Ired., 217.

46. When slaves, by a will made by a testator in South Carolina, were directed to be emancipated, and then the testator said, "all the balance of my estate to belong to C. J.," *it was held* that C. J. could not claim these slaves at law under the residuary clause, even if the bequest for emancipation were void by the laws of South Carolina, because they did not pass by the words of the residuary clause, but only fell into the residue by

the operation of law, and C. J.'s title was only an equitable one. *Jones v. Abernathy*, 11 Ired., 280.

47. A testatrix bequeathed as follows: "My girl, Maria, after my death, I do not leave her as a bond slave to any person; I wish her to live here among my children, or otherwise if she sees proper. I leave J. S. to act as trustee for said girl." Also, "I will and bequeath twenty-five dollars to Maria;" *it was held* that J. S., took the legal title to Maria, under the will. *Simpson v. King*, 11 Ired., 377.

48. Where a testator gave all his "property" to his wife, and directed that after her death "it should be sold," &c.; *it was held* that *choses in action* did not pass. *Pippin v. Ellison*, 12 Ired., 61.

49. The term "property," in its legal sense does not include *choses in action*; and in reference to personalty is confined to "goods," which embrace things inanimate, as furniture, &c., and "chattels," which embrace living things, as horses, &c. *Ibid.*

50. A testator bequeathed as follows: "I loan to my wife one negro man, Primus," &c., "also she may take choice of any one of the negro girls belonging to my estate, which I may not give away," &c., "and at the death of my wife, the negroes I have loaned to my wife, and their increase, I want to be equally divided between my four grand-children," &c.; *it was held*, that the wife took only a life estate in the girl selected by her from those not given away. *Hyman v. Williams*, 12 Ired., 92.

51. A residuary clause operates as a limitation of the interest of the tenant for life, and passes it over as effectually as if there had been an express limitation over of the specific thing.—*Ibid.*

52. A present bequest of a slave or money is not to be postponed until the expiration of a life estate, although connected by the word, "also" with a devise of land thus postponed, when the effect of such a construction would be an intestacy as to such slave or money, during such life estate. *Robertson v. Roberts*, 1 Jones, 74.

53. In giving a construction to a will, the presumption is that the testator did not mean to die intestate as to any part of his estate, and this presumption may be strengthened by declarations in the will to that effect. *Foust v. Ireland*, 1 Jones, 184.

54. Where a testator bequeathed personal property to his wife, so long as she should remain his widow, and in case she married should quit the plantation and give up the property, but made no provision for the alternative of not marrying, and the widow did not marry, *it was held* that the meaning might be that the widow should take an absolute estate in the property in the event of her not marrying, and that this construction was forti-

fied by the context of the will, that the testator intended to dispose of the whole of his estate. *Ibid.*

55. The word "heirs," when used in a will in relation to personal property, generally is held to mean those who take under the statute of distributions, and as such, the widow is generally included; yet, where the context shows plainly that children only are meant, the widow will be excluded. *Henderson v. Henderson*, 1 Jones, 221.

56. Where it is manifest from other clauses in the will, that the testator meant to separate two slaves from the mass of his estate, and to dispose of them differently from that which had been given to his wife for life, and it appearing also that his wife was an object of his special bounty, the following words were construed to pass to her an absolute estate in the slave in question, viz: "I further bequeath to my wife, C. N., two servant boys, Richard and Pinkney, to have and to hold, and to expose of at her own discretion while she lives, and at her death so as not to be disposed of out of the family;" and *it was held* further, that the latter words, "not to be disposed of out of the family," were inconsistent with the absolute estate given by the previous words, and were, therefore, inoperative. *Newland v. Newland*, 1 Jones, 463.

57. Where a testator had put certain slaves into the possession of his son-in-law and daughter A., as he had done towards several of his other children, and showed by several other provisions of his will, a general intention to confirm such possessions as gifts, and added a qualification to the gift to A. and her husband, to subject their legacy to the payment of a debt to him due by the son-in-law, if the debt were not paid within a certain time, and the debt was paid within the time; *it was held* that the gift of the slaves was established and confirmed in the daughter A., and they therefore became the property of her husband. *Sharpe v. Campbell*, 1 Jones, 520.

58. Where the testator declared his purpose to provide bountifully for his wife, which would be defeated, and a great inequality would be produced among his children and grand children, by adopting the rule of a division *per capita*, *it was held* that the court should, in the absence of express words, or a necessary implication to the contrary, apply the rule of a division *per stirpes*. *Bivens v. Phifer*, 2 Jones, 436.

59. The state of a testator's family, as well as that of his property, may be shown and considered in putting a construction upon his will. *Ibid.*

60. Where a father, on the marriage of his daughter, put into the possession of her and her husband certain slaves, for their advancement in life, and then made a will, which did not notice the slaves expressly in any legacy to such daughter, but there was an evident intention of the testator to provide equally

for all his children, seven in number, and great inequality would be produced among his children by defeating the gifts to the daughter in question, and two other children similarly situated, *it was held* that, as the making of the will prevented the parol gifts of the slaves from operating as advancements, a clause in it, giving all his negroes "not heretofore disposed of" to six of his children, among whom was not the daughter in question, should be construed to confirm to her and her husband the slaves which her father, the testator, had put in their possession. *Lawrence v. Mitchell*, 3 Jones, 190.

61. A testator, after disposing of a female slave absolutely to one, may give her increase to another. *Carroll v. Hancock*, 3 Jones, 471.

62. Where a life estate in personalty is given to one, and then over to a class, as to the children of a particular person, all the children who may be born during the continuance of the life estate will take, and, if one of them die during the continuance of the life estate, his or her interest will vest in his or her personal representative. When there is no life estate, an immediate bequest to a class will go only to those who answer the description at the death of the testator. *Ibid.*

63. A provision in a will, that a certain female slave "will be set free, if she behaves herself as a good character should do, to be under the care of my daughter J and her daughters," conveys no interest, either legal or equitable, to the daughters of J. *Malloy v. McNair*, 4 Jones, 297.

64. The grammatical construction of a clause in a bequest will be disregarded, if it seem to be opposed to the testator's intention. Hence, where one bequeathed a female slave to her son A for life, with remainder to his son B, and added "and if the said woman hath increase, to be equally divided among all *his* children," and it appearing that when the will was written A had several children besides B, but at that time B had no children, though he had some afterwards, *it was held* that the pronoun "his" referred to the children of A, and not to those of B. *Roberts v. Watson*, 4 Jones, 319.

65. A bequest of a fund of personalty to A and B and "their lawfully begotten heirs," there being nothing in the will to control the technical meaning of the words, gives the fund to them absolutely, to the exclusion of a child of B, by force of the rule in Shelly's case. *Worrell v. Vinson*, 5 Jones, 91.

66. Where a bequest is made to a trustee in trust for A and B and "their lawfully begotten heirs," it is subject to the same construction as if the bequest had been of the legal estate, because the trust is an executed and not an executory one. *Ibid.*

67. Where a testator, a ter giving his estate to his wife for life, and then over to a nephew and niece, added, "in the event of my wife's death, having and leaving an heir, provided it at-

ains maturity, the above will is revoked, and my property is to be divided by law, between my wife and heir or heirs," *it was held* that a child of his wife by a second husband could not take under the bequest. *McGinnis v. Harris*, 7 Jones, 213.

68. Where a father gave slaves to his daughter N, by his will, adding "which I intend for the said N. or her issue," and she had illegitimate issue at the date of the will, but no legitimate issue, and died after her father without having had any legitimate issue, *it was held*, that the bastard children could not take under the term "issue," there being nothing in the will to show that illegitimate issue was meant, but the mother took an absolute estate in the slaves, which became the property of her husband, *jure mariti*. *Doggett v. Mosely*, 7 Jones, 587.

69. A legacy, given immediately to a class, vests absolutely in the persons composing that class at the death of the testator; and a legacy given to a class, subject to a life estate, vests in the persons composing that class at the death of the testator, but not absolutely, for it is subject to open so as to make room for all persons composing the class, not only at the death of the testator, but also at the termination of the life estate. *Mason v. White*, 8 Jones, 421.

70. Where one of the class was living at the death of the testator, but died before the expiration of the life estate, his interest in the legacy is not divested by his death, but devolves upon his personal representative. *Ibid*.

71. Where a person, by his will, gave "all his slaves," equally to be divided among his children, and afterwards by a deed gave two of them, by name, to one of his children, *it was held*, that it was not a case of ademption, nor for an election, but that the donee of the two slaves comes in for an equal share of the other slaves. *Millsaps v. McLean*, 1 Winst., 80.

See (Legacy—Whether vested, contingent or executory.)

II. WHETHER VESTED, CONTINGENT OR EXECUTORY.

1. Where a testator gave to his wife a female slave, and to one of his daughters a child, then born, of the said slave, and then gave to another daughter the first child which said slave should have, and further directed that in event the said slave should have three children more, so that his two daughters should have two apiece, all the other children she might have should belong to his two sons, *held* that as soon as the children were born they vested in the daughters, and that the death of one of them would not entitle the daughters to another child in the place of the one dying, for the children born subsequently to the first three became vested in the sons, and could not be divested by the death of one of the three children. *Settle v. Wordlaw*, 1 Car. L. R., 371, (40.)

2. A testator gave to his wife "all the property he received with her;" and the rest of his estate to her until his son should come to lawful age, when the same should belong to him; and, in the mean time, directed that his son be educated and maintained at a reasonable expense out of his estate, in proportion to the value of all the property and its general profits and income." The widow died, leaving her son surviving her, and he died before he attained twenty-one years of age: *Held* that the legacy to the son vested in him on the death of the testator, and did not lapse by his death before twenty-one. *Johnson v. Baker*, 3 Murph., 318.

3. The word "when," standing by itself and applied to legacies, is a word of contingency, but an exception is made to the rule, where the testator has disposed of the intermediate interest, either to a stranger or the legatee. *Ibid.*

4. A testator gave as follows: "I lend to my wife the plantation whereon I now live, and after her decease I give the said land to my child that my wife is now pregnant with, if a boy, and if it should be a girl, I give the land to my son, H., upon his paying to the said child one hundred pounds:" *held* that the legacy of one hundred pounds to the child, it being a girl, was not payable until the death of the testator's widow. *Justices of Wayne v. Crawford*, 1 Hawks, 241.

5. A bequest in the following terms: "It is my will that my negroes shall be kept together until my children arrive to full age or marry, then to be divided between my beloved wife and children, share and share alike, equally; and it is my desire that whenever any of my children arrives at full age or marries, that his or her share of my estate be delivered to him or her immediately," was held to give a present vested interest to each child in his or her share of the negroes. *Clancy v. Dickey*, 2 Hawks, 497.

6. A testator gave by will his property to his two children, and if either of them should die, without leaving issue, the whole of his estate, both real and personal, to go to the survivor. B, one of the children, upon a bill for an account against the executor, obtained a decree for a sum of money, and, in part performance, accepted certain slaves which were not of the property of the testator. On the death of B, without issue, the survivor was *held* not to be entitled to recover these slaves from a stranger, to whom they had been *bona fide* sold by B. *Southerland v. Webb*, 4 Dev., 245.

7. Where a testator gave specific legacies to her sons W, D and S, and after directing the residue to be divided among them, proceeded: "but in case either of my sons D or S die, leaving no lawful issue then living, then my son W and the surviving one to have his part of all that is willed to him, and in case they should both die, leaving no lawful issue then living, then my son W to

have the whole of what I have willed to each of them," and S died, leaving issue, and then D died without issue; *it was held*, 1st, that the specific legacy given D, as well as his share of the residue, was subject to the limitation over; 2d, that W alone succeeded, as there was no limitation in favor of the issue of S. *Ormond v. Gibbs*, 4 Dev., 504.

8. In a bequest of personal property to B. R., "and if he die leaving no heir lawfully begotten of his body" then over, the limitation is not too remote, but is good as an executory devise. *Miller v. Williams*, 2 Dev. and Bat., 500.

9. Where a testator, after a bequest of slaves to each of his three grand-sons "and their heirs forever," and leaving them his executors and residuary legatees, bequeathed to his granddaughter as follows: "I give to my grand-daughter, J. T. A, ten negroes, by name Jane, &c., to have and enjoy the said negroes during her natural life, and at her death to be equally divided amongst the heirs of her body, or in case she should die without a surviving child or children, that the said negroes, with their increase, shall return to my three grand-sons as above named, or to their heirs; *it was held* that the grand-daughter took only a life estate in the slaves, with a contingent remainder to such of her children as should be living at her death. *Allen v. Pass*, 4 Dev. and Bat., 77.

10. In a bequest of slaves to a married woman for life, and then to all the children which she may have at the time of her death; and in case "any of them should die before marriage or arrival at full age," then the share of such to the survivors of them; "and if all of them die before marriage or arrival to full age," then over to other persons; the word "or" will be construed "and," and the limitation over will not be too remote, but will take effect upon the death of the mother, and of all her children, under age and unmarried. *Montgomery v. Wynns*, 4 Dev. and Bat., 527.

11. The interest in an executory bequest is transmissible to the executor of one dying before the happening of the contingency, upon which it depends. *Lewis v. Smith*, 1 Ired., 145.

12. A bequest by a testator, "in the event of his having no heirs," to his niece, is good at common law, and vests a title in the niece, if the testator die without children. *Tillman v. Sinclair*, 1 Ired., 183.

13. A testator bequeathed certain negroes to his three children, J., S. and N., and then proceeded as follows: "In case either of my said children should die without heir lawfully begotten, it is my wish that the property should be equally divided among the children *then living*, whether J., S. or N. J. died first, and then N. died without issue, leaving S. surviving: *Held*, that under this limitation S., the surviving child, took the property belonging to N. *Fortescue v. Satterthwaite*, 1 Ired., 566.

14. A testator bequeathed as follows: "I leave the whole of my other estate, as well negroes as goods and chattels, to be equally divided between my four children, A., B., C. and D., and for my executors to have it appraised and pay off each child's part as they shall come to age, the boys to have their part at the age of twenty-one years, and the girls to have their part at the age of eighteen years, and if either of my children die without heir lawfully begotten, then his or her part to be equally divided between my surviving children and their heirs forever." A. died first, leaving children, and then B died leaving no children. *It was held* that the limitation over in the will was not too remote; that on B's death without issue, his share became vested in C. and D., who survived him; and that as A. did not survive him, no part of such share vested in the personal representative or the children of A. *Threadgill v. Ingram*, 1 Ired., 577.

15. A testator bequeathed as follows: "I give to my son, W., certain negroes named, &c., to him, his heirs and assigns forever; but in case he should not arrive at the age of twenty-one years or marry, my desire is that my daughter S. have the aforesaid negroes." S. married and died in the lifetime of W., who afterwards died, unmarried and under age. *It was held* that the contingent interest, thus bequeathed to S. in these negroes, was transmissible to her representatives, and on the death of W., under age and unmarried, became a vested, absolute interest in her administrator, and, that this construction was not affected by the fact that in another clause the testator gave other negroes to S., with a like contingent limitation to W., in the event of S.'s dying unmarried and under age. *Jacocks v. Mullen*, 2 Ired., 162.

16. A testator bequeathed as follows: "I lend to my daughter, N. E. M., the following property, to wit, negroes Lewis, &c., and one bed and furniture, &c. If my daughter, N. E. M., should depart this life without issue, then it is my will that her husband, W. C. M., should have one-half of the property I have lent to her; but the property is to be held in trust by my executors until the death of my daughter, N. E. M., and then her half of the property is to be equally divided between her brother J. and her two sisters M. and R." W. C. M. died, after the testator, leaving his wife N. E. M. surviving him, and then she died without issue. *It was held* that W. C. M. took a contingent interest in remainder in one-half of the property, which, upon his death, was transmitted to his administrator, and that upon the death of his widow, N. E. M., without issue, his administrator had a right to recover it. *Moore v. Barrow*, 2 Ired., 436.

17. A testator, in 1836, bequeathed as follows; "The balance of my estate to be equally divided between my wife and children," and in another clause, "my wish is, should either of my children die without leaving an heir begotten by their body or bodies, that the survivor or survivors have the whole;" and in another

clause "should my children all die without leaving an heir, begotten by their bodies, my wish is that my brother T. should heir the whole of my estate as allotted to my children." The testator died, leaving three children, M., O. and E., of whom M. died, leaving a child, and afterwards O. died without issue, leaving E. surviving. *It was held* that all the estate of O. so dying, became vested in E., her only surviving sister, and that the child of M. was not entitled to any share of it. *Skinner v. Lamb*, 3 Ired., 155.

18. Where a legacy is given to "children," as a class, payable at a future day, any child who can entitle itself under the description at the time when the fund is to be divided, may claim a share thereof. *Wallis v. Cowell*, 3 Ired., 323.

19. Before the act of 1827, a bequest of personal property to "A and his heirs," and "if he should die and leave no lawful issue," then over to B was a good executory limitation to B, to take effect if A died without leaving any issue living at the time of his death. And if B died before A, this executory interest was so far vested that, on the happening of the contingency, the personal representative of B would take it. *Robards v. Jones*, 4 Ired., 53.

20. Where a testator, before the act of 1827, bequeathed as follows: "I give to my son J. W., all my negroes, to him and his heirs lawfully begotten of his body; but if he should die without lawful heirs, then my wish is, to S. W., to him and his heirs for ever," *it was held*, that the limitation over was too remote, and that J. W. took the absolute estate in the slaves. *Lister v. Skinner*, 4 Ired., 57.

21. Where there is a bequest in a will to a class of persons, as to children, courts are always anxious to effectuate the intention of the testator, by including as many persons answering the description as possible. *Meares v. Meares*, 4 Ired., 192.

22. When legacies are given to children, payable or to be divided at some period subsequent to the testator's death, then those persons, whether born before or after the making of the will, or before or after the death of the testator, who come into being before the period of division, &c., and answer the description at that time are, entitled. *Ibid.*

23. In construing a father's will, although the division may not be postponed, a bequest to his own children will be held to include all of them in being at his death, unless it be evident upon the will, that the testator meant the provision only for those living at the date of the will. *Ibid.*

24. A testator bequeathed certain slaves to three of his daughters and to a child, then *in ventre sa mere*, to be divided at a designated period, and then directed, "And if either of my daughters, or the child my wife now appears pregnant with as aforesaid, should die after the division, without lawful issue, it is my

will that such part should be equally divided between my wife and my surviving children." The child born afterwards died after the division and without issue, leaving his mother, and two of the daughters surviving him. *It was held* that the limitation over was good as to the mother and the two surviving daughters, but that it did not extend to the children of one of the daughters who had died before the son. *Long v. N. Rom*, 4 Ired., 255.

25. A testator, by his will made in 1808, bequeathed certain personalty to four brothers and sisters, to them, their heirs and assigns, and then added, "if either of them should die without any *heir in marriage*, then their legacy to their own brothers and sisters," *it was held* that the remainder over was too remote, and was therefore void. *Cox v. Marks*, 5 Ired., 361.

26. A, having four children, bequeathed, since the act of 1827, certain slaves to his daughter N., then a married woman, and if she died without issue, one-half to her husband, and the other half to her brothers and sisters. After the assent to the legacy, N. died without issue, leaving a brother and two sisters, one of whom was then a married woman, but her husband died soon afterwards. *It was held* that the husband had a vested legal interest in one-third of the moiety of the said slaves, which, on his death, passed to his administrator. *Skinner v. Barrow*, 5 Ired., 414.

27. A bequest of slaves to A, and "after her death to be equally divided between the heirs of A's body," is a good limitation to the children of A. *Miles v. Allen*, 6 Ired., 88.

28. A testator devised and bequeathed as follows: "I give to my son, B. D. H., all my estate after settling my debts, except \$300. If B. D. H. does not live till of age, then I dispose of my estate as follows: I give to my sisters," &c. B. D. H. died under age, and *it was held* that he was entitled to the profits of the estate, which consisted of land, negroes and other chattels, (except the \$300) during his life. *Albritton v. Sutton*, 9 Ired., 389.

29. A bequest was as follows: "I give to E. and S. all the negroes I sent to my daughter P., to them and their heirs forever; and if they should die without an heir, for said negroes to be equally divided between H. and all my children." E. married the defendant, and died without leaving a child. S. married the plaintiff, is still living, and has several children, and *it was held* that E. and S. took vested estates; that cross remainders could not be implied, and that E.'s estate could only be defeated, upon the contingency of S.'s dying leaving no child. *Coffield v. Roberts*, 13 Ired., 277.

30. A testator directed that his whole estate was "to remain together as a joint stock of my wife and children, and my farm continue under the management of my executor, for their support and education, and that each one, if a son, receive his dis-

tributive share, when he arrives at the age of twenty one years," &c. D., one of the sons, died at the age of six years, and the court having held that the widow, on her marrying again, had a right to withdraw her share from the joint stock, the administrator of D. claims D.'s share as demandable at his death, or his aliquot proportion of the income thereafter accruing; *it was held* that he was entitled to neither, the share not being demandable until the time when D. would have attained twenty-one, and the income belonging to the other legatees, exclusive of the widow. *Petway v. Baker*, Busb., 268.

31. A bequest of slaves to one for life, and at his death "to his heirs lawfully begotten of his body, and for want of such heirs," to certain persons designated, was held to be a good limitation to such persons, under the act of 1827. *Sanderlin v. DeJord*, 2 Jones, 74. (See Rev. Code, ch. 43, sec. 3.)

32. A bequest of a contingent interest to children, without any reference to their death during the pendency of the contingency, vests such an interest as survives them on their dying before the happening of the contingent event, and goes to their personal representatives. *Ibid.*

33. Where a testator gave by will certain slaves, also, half a dozen table spoons and one dozen tea spoons, to his three daughters, with a provision that if either of them should die after the division, without lawful issue, her part should be equally divided between his wife and the surviving children; *it was held*, that the limitation over of the slaves, as well as of the spoons, was good, notwithstanding there was a reservation to his wife of a life estate in one of the slaves named. *Long v. Wright*, 2 Jones, 140.

34. Where a testator bequeathed slaves to his five children, and added, "in case any of my aforesaid children shall die without a lawful heir, begotten of his or her body, then his or her share to be equally divided among the survivors;" and three of the children having died, and their estates been disposed of, *it was held*, upon the death of the fourth without issue, that his share had become absolutely vested in him and went to his personal representative, and did not survive to his sister, who was the last survivor of the children. *Webb v. Weeks*, 3 Jones, 279.

35. A testator bequeathed two slaves to his daughter, and requested that she should reside with her mother while she remained single, and then added "if she should die single, then the property willed to her" to go over to others. The daughter married, but survived her husband and then died, and *it was held* that she did not "die single" within the meaning of the testator, and that, therefore, the limitation over did not take effect. *Lashley v. Lashley*, 3 Jones, 414. *

36. Where a testator directed that, as any one of his children should come of age or marry, certain slaves should be divided

into lots and the child so coming of age or marrying should have a lot assigned to him or her, the remainder of the slaves to continue in common until another child came of age or married, when another lot was to be assigned, and so on; and then the testator added these words, "and the negroes thus drawn shall become absolutely the property of the heir drawing the same, and shall exclude the said heir from any further claim in this stock of negroes, unless some one of the heirs should die without legal issue, in which case the surviving ones shall inherit equally;" *it was held* that as each lot was assigned, it vested absolutely in the child receiving it, and that the provision for a division of a share of a child dying without issue applied only to a child so dying before any lot had been assigned to him or her. *McEachin v. McRae*, 5 Jones, 19.

37. After a gift of property to the testator's wife, it was added: "But should my wife die without heirs of her body, then at her decease, the whole of the property to go the use and benefit of my daughter," and *it was held* the will being made before the act of 1827, that the limitation over was restricted to the wife's death, and therefore not too remote. But there being another provision in the will that should the daughter "die previous to the death of my said wife, and without marrying or having heirs of her body, that then the land and property which I have bequeathed to her shall revert back" to the wife; *it was held*, from those and some other expressions favoring the same view, that the limitation to the daughter, at the wife's death, was not to take effect unless the wife's death was precedent to that of the daughter, and that, as the wife survived the daughter, the property given her became absolute at the death of the daughter. *Baker v. Pender*, 5 Jones, 350.

38. A transposition of the sentences of a will is allowed by the rules of construction, when the manifest intention of the testator requires it. *Ibid.*

39. A limitation of a female slave and her issue over to a person, upon the contingency that the first taker "shall die under age or without leaving issue," will fail if the first taker arrive at the age of twenty-one years, although he may afterwards die without issue. *Black v. McAuley*, 5 Jones, 375.

40. A bequest of slaves to a daughter, with a provision that "if she should have issue living at her death" then to such issue, but "if she should die without leaving lawful issue" then over, *was held*, upon her dying without leaving children, to be a good limitation in remainder. *Newnan v. Miller*, 7 Jones, 516.

41. A testator, in 1819, bequeathed a negro woman to his daughter "and her heirs of her own body forever, and, if none, to return after her death" to the rest of the testator's children equally, *it was held* that the limitation over to the testator's other children was not too remote. *Blake v. Page*, 1 Winst., 255.

42. These words in a will, "I give to my daughter S. four slaves, named, &c., to her and her heirs; provided, nevertheless, if the said S. die childless, then it is my desire that my son A. move back to this county, and to have them, but not to take them to any other part of the country," vests the slaves in A. absolutely, the request to move back being precatory only, not mandatory. *Harris v. Hearne*, 2 Winst., 92.

See (Husband and Wife—Husband's interest in his wife's estate, &c., 26.) (Legacy—Construction—What passes and who takes, 21-23-24-29-35-36-42-44-61-69-70.)

III. OF THE ASSENT OF THE EXECUTOR AND ITS EFFECT.

1. Where there is a legacy for life or years, and no remainder limited over, the assent of the executor enures only to the benefit of the particular tenant; and the executor is entitled to the possession of the chattel again after the expiration of the particular interest. *Anonymous*, 2 Hay., 161, (346,) S. P. *Jones v. Masters*, 3 Murph., 110, *Black v. Ray*, 1 Dev. and Bat., 334. *McKenley v. Scott*, 4 Jones, 197.

2. The assent of executors to the first taker is an assent to all subsequent takers of a legacy, limited over by way of remainder or executory devise. *Dunwoodie v. Carrington*, 2 Car. L. R. 469, (355.)

3. But this rule does not prevail, when, after the death of the first taker, the executor has a trust to perform arising out of the property, which therefore must be subject to his control, and he must have the legal title. *Ibid.* S. P. *Allen v. Watson*, 1 Murph., 189.

4. An assent to a legacy may be presumed from the executor's holding it for five years, claiming it as next of kin of the legatee, and selling it as his own. *Merrit v. Windley*, 3 Dev., 399.

5. An assent to the legacy of a slave by the executor of a will, made by a *feme covert* under a power, does not vest the legal title in the legatee, although the trustee in the marriage articles be also the executor, unless he assent by deed or by actual delivery. *Ibid.*

6. If a legatee take possession of property, claiming it under the will, and retain it for many years, the assent of the executor to the legacy may be presumed. *White v. White*, 4 Dev. 257, S. P. and S. C., 1 Dev. and Bat., 260.

7. If a testator by his will forgive a debt, the assent of the executor is necessary, before the debt is extinguished. *Cheshire v. Cheshire*, 2 Dev. and Bat., 254.

8. An assent to a legacy by an executor may be presumed from his acts or declarations, as well as be expressly proved; but where upon a bequest of a pocket book and its contents, the executor estimated the amount, and stated that that was all the

legatee took under the will, *it was held* to be not in law an assent, but only a fact from which it might be presumed. *Ibid.*

9. Where a testator bequeathed a negro woman to his wife for life, and if the woman should have another child, then after his wife's decease that his daughter should have the child, *it was held* that the assent of the executors to the legacy of the negro woman, to the wife for life, was an assent to the bequest of the child to the daughter, although such assent was given before the child was born. *Conner v. Satchwell*, 4 Dev. and Bat., 72.

10. An assent by an executor to a bequest for life, where upon the termination of the life estate it is not necessary for the purposes of the will that the executor should retake possession of the thing bequeathed, operates as an assent also to the ulterior bequests. And where the tenant for life, who is himself the executor, retains possession of the thing bequeathed for thirty years, the jury not only may, but are bound to infer an assent to the bequest. *Lewis v. Smith*, 4 Dev. and Bat., 326.

11. Acquiescence by an executor, in the possession or sale by the legatee for life of the thing bequeathed, furnishes a ground for inferring an assent to the ulterior bequest. But where the person named executor in the will refuses or neglects to accept the office, no acquiescence on his part or act of his, not amounting to an act of administration, will justify the inference; because, in order thereto, there must be an executor to assent. *White v. White*, 4 Dev. and Bat., 401.

12. Where a testator bequeathed certain slaves to one for life, and then over to another person, and the legatee for life, without any renunciation of the executors named in the will, obtained letters of administration with the will annexed upon the estate, and took possession of the slaves, and retained them for more than thirty years, until his death, *it was held* that the jury might infer an assent of the executors, or make any other reasonable presumption of fact, to uphold the right of the legatee in remainder. *Lewis v. Smith*, 1 Ired., 145.

13. Where a person, who claimed a specific legacy, was permitted by the executor to take it into possession, upon an agreement that if it should be decided that he was not entitled to it, it should be returned to the executor, *it was held* that this was a sufficient assent to the legacy, it being afterwards determined that the claimant was entitled under the will to the legacy claimed. *Lillard v. Reynolds*, 3 Ired., 366.

14. Where slaves are bequeathed by a testator to his widow for life or widowhood, and after her death or marriage to be divided among her and her children, the assent of the executor to the legacy vests a right in those in remainder, so that an executor *de bonis non* cannot recover them. *Etheridge v. Bell*, 5 Ired., 87.

15. When, in a suit by legatees against the administrator with the will annexed, it was decreed that the administrator should

deliver to three of the four legatees, entitled to legacies of slaves, their respective slaves, which was done, and as to the other share (the legatee being in parts unknown,) it was decreed that it "should be allotted to the administrator, &c., for the use" of such legatee, upon the trust declared in the will, &c., and the administrator, under this decree, kept possession of the share of the slaves thus allotted, and hired them out and deposited the hires in court, *it was held* that this amounted to an assent to such legacy. *Buffalow v. Baugh*, 12 Ired., 201.

16. An executor in Virginia has no right to assent to a legacy of property situate in this state, without making probate of the will, and taking letters testamentary from our courts. *Stamps v. Moore*, 2 Jones, 80.

17. When an adverse possession of a chattel specifically bequeathed commences after the death of the testator, the executor may assent to the legacy so as to enable the legatee to sue for it in his own name; but it is a question, whether this can be done when the adverse possession commenced before the testator's death. *Johnson v. Arnold*, 2 Jones, 113.

18. An executor may lawfully assent to a specific legacy before the debts of the estate are paid. *Edney v. Bryson*, 2 Jones, 365.

19. The assent of an executor to a specific legacy may, under circumstances, be legitimately implied. *Ibid.*

20. If the executor permit a slave, bequeathed by the testator to his daughter, to remain with her at the late residence of the deceased, for ten years, without assuming himself any control over the slave, it is certainly some evidence of an assent. *Prout v. Roseman*, 4 Jones, 130.

21. A bequest of a slave for the life of the legatee, without any limitation over, passes only a life estate to such legatee; and the assent of the executor extends no further than such life interest, so that after its termination he may recover the slave. *McKinley v. Scott*, 4 Jones 197.

22. Where slaves were given by will to one for life, with a limitation over to another, and the executor assented to the estate of the first taker, his assent to the ulterior estate will be implied, and the repudiation of the legacy by the first taker will not do away with the effect of the executor's assent to the succeeding gift. *Hotchkiss v. Thomas*, 6 Jones, 537.

23. A limitation over of a chattel interest, after the expiration of a life estate, is not strictly a remainder, but an interest *in futuro*, created by an executory devise of a distinct property, and the rule, that the assent of the executor to one is an assent to the other, is not founded on the idea that the two interests constitute one estate, but because, it being the executor's duty to assent to both, when it is made to the first estate it will be con-

sidered as having been made to both, unless restricted to one alone. *Ibid.*

24. There is nothing in the Revised Code, ch. 119, sec. 29, providing for a child born after the will of his father was made, which makes an exception to the rule of law, that an assent by an executor, to a tenant for life of a chattel, is an assent to the ulterior legatee. *Windley v. Gaylord*, 7 Jones, 55.

25. The assent of an executor to the tenant for life of a chattel generally leaves nothing that can vest in the administrator *de bonis non* of the testator. *Ibid.*

26. A bequest cannot, in law, have the effect of confirming a parol gift of a slave, so as to vest the title in the donee, independently of the assent of the executor. *Wooten v. Jarman*, 7 Jones 238.

See (Executors and Administrators—Of their liability to legatees and next of kin, 4-5.) (Trover—When it will lie, 4.)

IV. WHEN A LEGACY WILL BE PRESUMED TO HAVE BEEN PAID OR SATISFIED.

1. After the death of all the executors of an estate, and at the end of forty years, a presumption of satisfaction or abandonment of a legacy becomes cogent, unless it be repelled by the time of the payment of the legacy, the age of the legatee, the practice of some particular imposition, or other sufficient circumstances. *Morrison v. McElrath*, 4 Dev. and Bat., 474.

2. The lapse of time will not help an executor, when he admits that he paid a legacy to the wrong person, as to an insolvent father when the children were entitled to it, and will not raise a presumption of payment to the children, or an abandonment or acquiescence by them. *Wallis v. Cowell*, 3 Ired., 323.

3. Where an administrator holds a distributive share, without closing up the estate by a settlement and payment of the balance struck, the remedy of the next of kin can only be barred by the common law presumption, arising from the lapse of twenty years. But where he files a settlement, setting out the admitted balance, and the matter is closed upon that footing by a receipt in full of such balance, if the next of kin afterwards seek to impeach the settlement, he must do so within ten years, or he will be barred by the act of presumptions. Rev. Code, ch. 65, sec. 19. *Wilkerson v. Dunn*, 7 Jones, 125.

4. The common law presumption as to a legacy or distributive share does not begin to run against one who is an infant, until he comes of age. *Ibid.*

V. LEGACY "AFTER DEBTS PAID," WHAT FUND LIABLE FOR THEM.

1. Bequest, "after my debts are paid, it is my will that my stock of hogs and cattle, &c., shall go to M. W.," the debts are

to be paid out of the undisposed surplus, if there be any, as that is the primary fund for the payment of debts. *Battle v. Yates*, 2 Hay., 304, (492.)

VI. FOR THE SEPARATE USE OF A FEME COVERT.

1. A bequest of a slave to a *feme covert* "for her proper use" does not vest in her a separate and exclusive right; but the legacy, if assented to by the executor, goes to the husband; for the court will not force a construction, to give a legacy to the separate use of the wife. *Gilliam v. Welch*, 4 Dev., 286.

2. Where a testator bequeathed thus: "to the only proper use of my daughter Margaret:" and it did not appear in the will, nor by the proof, that she was a *feme covert*, though she was so in fact, *it was held* that the property was not given to her sole and separate use, so as to deprive her husband of his marital rights. *Bason v. Holt*, 2 Jones, 323.

VII. LAPSED, VOID AND ADEEMED LEGACIES.

1. When a legacy is given to four children by name, and one of them dies in the lifetime of the testator, his legacy is lapsed, and must be distributed as undisposed of property, among the next of kin of the testator, provided there is no residuary clause in the will. *State v. Shannonhouse*, 7 Ired., 9.

2. A testator bequeathed a negro woman to his daughter, and afterwards sold her, and kept the amount received from the sale, to be given to the daughter in lieu of the negro sold, but made no alteration in his will, and *it was held* that the legacy was adeemed, and that the daughter had no right to the price of the negro. *Snowden v. Banks*, 9 Ired., 373.

See (Legacy—Construction—What passes and who takes, 71.)

LEX LOCI.

1. If, before our act of 1823, a deed had been executed in another state, limiting slaves to one for life remainder over to another, the limitations of the deed would have been supported, had it been shown that they were good according to the laws of that state. *Smith v. Tucker*, 2 Dev., 541.

2. The law of the country where the contract was made is the rule by which its validity, its meaning, and its consequences are to be determined. But where a law of Virginia gives *bona fide* purchasers of slaves from a bailee, who has had possession more

than five years, a good title against the bailor, unless the bailment be registered, if a purchase, pending a suit by the bailor against the bailee, would not be valid in Virginia, so neither would it be in this state, although the suit was pending in Virginia, and therefore was not notice to the vendee here. *Watson v. Orr*, 3 Dev., 161.

3. In construing the law of another state the decisions of that state, if known, are to be followed. *Ibid.*

4. The interpretation of a will made in another state must be determined according to the laws of that state. *Knight v. Wall*, 2 Dev. and Bat., 125.

5. The courts of this state do not know the law of other states, and a controversy respecting that law is ordinarily one of fact, which must be decided on evidence by the jury, under the instruction of the court. *Ibid.*

6. The only exception to this rule is when *nul tiel record* is pleaded to the judgment of a court of record in another state, in which case the court here must pass, not only upon the existence of the supposed record, but upon its legal effect. *Ibid.*

7. The laws of this state, at the time of the cession of Tennessee, must be taken to be the laws of that state, until it be shown that they have been altered or repealed. *State v. Patterson*, 2 Ired., 346.

8. A gift made in South Carolina, which is good by the law of that state, is good in this state. *Adams v. Hayes*, 2 Ired., 361.

9. A deed, executed in South Carolina for a slave then being in this state, with certain limitations over, which by the law of that state are invalid, but which by our law are good, must be construed according to the law of that state, and, therefore, the limitations over are void. *Morrow v. Alexander*, 2 Ired., 388.

10. A contract for money payable generally, naming no place of payment, is to be taken to be payable at the place of contracting the debt, and not where the domicile of the creditor may be. *Arrington v. Gee*, 5 Ired., 590.

11. Where a contract is made in another state, it is to be governed by the laws of that state, and not by those of North Carolina. *Anderson v. Doak*, 10 Ired., 295.

12. Where A purchased a slave of B, in the state of Virginia, and took there a bill of sale, which, though not valid under our statute, was good and sufficient by the laws of that state; and the slave was, at the time of the said sale, in the possession of C, as bailee of B, in this state, and he afterwards sold the same. *It was held* that, in a suit by one claiming under A against the vendee of C, the *lex loci contractus* determined the sufficiency of the conveyance from B to A, and that it, therefore, passed a good title. It would have been otherwise, had the defendant been claiming as a creditor, or under a creditor of B; in which case the *lex rei sitæ* would govern. *Drewry v. Phillips*, Busb., 81.

13. If, by the laws of a foreign country, a contract is void

unless it be written on stamped paper, it is void *every where*. This principle is especially applicable to the several states of this confederacy, which, though foreign to each other in some respects, are united for all great national purposes under one government. Therefore, a bond executed and payable in the state of Maryland, which is void under the laws of that state, because the same was not written on stamped paper, is void here also, and cannot be recovered in the courts of this state. *Satterthwaite v. Doughly*, Busb., 314.

14. The *lex fori*, and not the *lex loci contractus*, applies to the presumption of the payment of a bond executed in Virginia, but upon which suit is brought in this State. *Hawes v. Craigie*, 4 Jones, 394.

15. A will made in another state, which is there subject to be construed according to the rules of the common law, will have the same construction as if it had been made in this state, unless it appear by judicial decisions, or by the opinions of men learned in the laws of that state, that a different construction would there prevail. *Worrell v. Vinson*, 5 Jones, 91.

16. A limitation over of personal property, situated in this state, after an indefinite failure of issue, by a will made in other state by one domiciled in that state, is too remote; as the common law, in the absence of proof to the contrary, will be presumed to be in force in that state. *Black v. McAulay*, 5 Jones, 375.

17. Where a slave was sold with a written warranty of title in Alabama, and the purchaser held him there adversely for more than six years, and it was shown that such a possession gave a title by the laws of that state, *it was held*, in an action in this state for the breach of the warranty, that the title was made good by the laws of Alabama, and that, therefore, the plaintiff could not recover, although he proved that the slave had run away in South Carolina, and a court of that state had decided that the title thus acquired in Alabama was invalid, against a person who had previously had title in the State of South Carolina. *Alexander v. Torrence*, 6 Jones, 260.

18. Where a contract is made in one country, but to be performed in another, the rate of interest will be according to the law of the latter. *Roberts v. McNeely*, 7 Jones, 506.

. See (Interest, 4-16-17-18-20.)

LIBEL.

See (Indictment—Form and matters relating threto, 127)
(Indictment—Variance between the allegation and proof, 1.)

(Action on the case—Slander, 5-9-42-63.) (Evidence—In criminal proceedings and indictments, 67.)

LICENSE.

1. It is not reasonable, and therefore not legal, to presume a more extensive license than is essential to the enjoyment of what is expressly granted. Therefore, a license to enter a man's land, for the purpose of taking off corn, must be construed a license to enter by the usual mode of access provided for such purpose, as through the gate or other appropriate entrance. *Gardner v. Rowland*, 2 Ired., 247.

2. He who abuses a *legal* license is a trespasser *ab initio*. Therefore, where a man's hogs get into another's field, and the owner of the hogs in driving them out lets down the plaintiff's fence, instead of driving them through a gap or gate, he is guilty of a trespass. *Ibid.*

3. Where A grants a license to B, to flow the water from B's land through A's ditch, B has no right to increase the quantity of water so flowed, either by adding to the number of his ditches, or clearing new land, or enlarging his ditches, so that the flow of water will be greater than it was when the license was granted; and if B do so, A may recover damages for any injury sustained thereby. *Carter v. Page*, 8 Ired., 190.

4. A license to turn one stream upon A's land is not an authority to stop that, at the party's pleasure, and turn another in its stead. *Ibid.*

5. A license to enter upon land and take fish out of the owner's pond cannot be implied by proving a usage, or custom, in the country at large, for every person to enter upon his neighbor's land and take fish. *Winder v. Blake*, 4 Jones, 332.

6. An indefinite number of persons are not capable of taking by grant, nor are they capable of accepting a license, except in the case of innkeepers, shopkeepers, and the like, who undertake to serve the public. *Ibid.*

See (Mills—Action at common law for damages caused by a mill, 2.) (Mills—Proceedings under the act of 1809, 13.) (Trespass—Of trespass *quare clausum fregit*, 9.)

LIMITATIONS---STATUTE OF.

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| I. When the statute begins to run. | IV. *Effect of the statute upon the title to slaves |
| II. When the statute will, or will not, bar in personal actions. | V. Limitation as to suit against executors, administrators, heirs and devisees. |
| III. Limitation of actions on official bonds. | VI. Limitation as to real estate. |

*Slavery is now abolished in North Carolina. See the note to the title Slaves.

I. WHEN THE STATUTE BEGINS TO RUN.

1. The statute will begin to run, where A. detains the chattel of B., only from the time when B. knows where it is, and that it is claimed adversely. *Berry v. Pulliam*, 1 Hay., 16, (21.) S. P., *Elwick v. Rush*, *Ibid*, 28, (37.)

2. The statute runs from the date of the last item in an account, when the account has been running on from its first commencement, but when it is once deserted or ended between the parties, then from that time. *McNaughton v. Norris*, 1 Hay., 216, (246.)

3. When the statute begins to run, none of the impediments mentioned in the act will stop its course. *Andrews v. Mulford*, 1 Hay., 311, (358.) S. P., *Anonymous*, *Ibid*, 416, (480.) *Cobham v. Neal*, 2 Hay., 5, (150.) *Pearce v. House*, N. C. Term Rep., 305, (722.)

4. In the case of slaves, the statute begins to run from the time they got into the defendant's possession, unless he were entrusted with them by the plaintiff for an indefinite time, (for then the statute will not begin to run till a demand,) or unless the defendant removed himself, so that the plaintiff could not find him to bring suit, or had the slaves without the knowledge of the plaintiff.—*Elmore v. Mills*, 1 Hay., 359, (412.)

5. The statute will run, though the defendant may be out of the country. *Anonymous*, 1 Hay., 459, (528.)

6. Where one drew the pay of a soldier, the latter's right of action accrued immediately, and the statute then began to run. *Sweat v. Arrington*, 2 Hay., 129, (293.)

7. In case of fraud, the statute will not run but from the time of its discovery. *Ibid*. (Overruled by *Hamilton v. Shepherd*, 3 Murph., 115.)

8. If the purchaser of a *chose in action* sue in his own name and be non-suited, and afterwards sue in the name of the vendor, the former suit will not suspend the operation of the statute as to the last suit, because there is no privity in law between the vendor and vendee of a *chose in action*. *Halsey v. Buckley*, 2 Hay., 234, (414.)

9. If a trespass be begun by entering on lands three years before the action of trespass, and be continued until the action, the plaintiff is barred by the statute, because the action is founded on the first tortious entry. *Pitman v. Casey*, 2 Hay., 293, (478.)

10. The statute will only run from the last article in an account current. *Kimbal v. Person*, 2 Hay., 394, (593.)

11. An order of the court of equity, directing a note to be deposited with the clerk and master, by which the plaintiff was delayed in bringing his suit, will not prevent the commencement or stay the operation of the statute. *Vance v. Grainger*, Conf. Rep., 71, (203.)

12. The statute begins to run from the time the plaintiff has cause of action against the defendant. *Coomer v. Little*, Conf. Rep., 92, (223.)

13. The saving in the statute, as to persons "beyond seas," does not extend to persons resident in other states of the Union. *Whitlock v. Walton*, 2 Murph., 23. *S. P. Earle v. McDowell*, 1 Dev., 16.

14. The statute of 31 Eliz., limiting the time for bringing *qui tam* actions, is in force in this state. *Bridges v. Smith*, 2 Murph., 53. (Now repealed, and suits for penalties provided for, in Rev. Code, ch. 65, sec. 3.)

15. In an action on the case for fraud in the sale of a land warrant, the action accrues, and the statute begins to run, from the time the fraud was committed, and not when it was discovered. *Hamilton v. Shepperd*, 3 Murph., 115.

16. Where A owed B, and made him a payment, taking his acknowledgment with a promise to refund in case the payment exceeded the amount due, and upon a reference the arbitrator found that B was overpaid, *it was held*, in an action upon the acknowledgment and promise, that the statute did not begin to run until the award was made. *Falls v. McKnight*, 3 Dev., 421.

17. A surety, who pays money for his principal, has a complete right of action against his co-surety for his rateable part, from the time of such payment; and the statute, therefore, begins to run from that time. *Sherrod v. Woodard*, 4 Dev., 360.

18. Where the owner of slaves made a parol gift of them to his son-in-law, who bequeathed them to his children and died, leaving the donor executor of his will and guardian of his children, *it was held* that the taking possession of the slaves and hiring them out, first as executor and then as guardian, was not a possession adverse to the title of the donor, and that the statute of limitations did not begin to run against him, until he had permitted a division of the slaves between his grandchildren, and delivered them over. *Alston v. Hamlin*, 2 Dev. and Bat., 115.

19. Where an original writ is returned "not found," and a term of the court is suffered to elapse without suing an *alias*, the suit is discontinued; and if, at a subsequent term, an *alias* be

sued out, its date is the commencement of the action, and the statute begins to run from that time. *Fulbright v. Tritt*, 2 Dev. and Bat., 491.

20. If an action be wrongfully brought in the name of one without his knowledge or consent, and he have to pay the costs upon its dismissal, his right of action for the *tort*, against the person who wrongfully sued in his name, accrues, not from the commencement of the wrongful action, but only from the time when he is compelled to pay the money on account of it; and, consequently the statute of limitations will begin to run only from that time. *Miller v. Eskridge*, 1 Ired., 147.

21. In the case of a person dying intestate in another state, the statute does not begin to run here, until administration is granted in this state. *Lee v. Gause*, 2 Ired., 440.

22. Where A. undertook to go to Georgia, sell a negro of the plaintiff and collect his hire, and with the proceeds pay off, *upon his return to this state*, a certain judgment, *it was held* that a right of action accrued to the plaintiff, as soon as A returned to this state; and, instead of applying such proceeds to the satisfaction of the judgment, appropriated them to his own use; and, of course, the statute began to run from that time. *Baines v. Williams*, 3 Ired., 481.

23. No excuse (beyond the exceptions in the statute itself,) such as the deception of the defendant, &c., will, in a court of law, prevent the statute from running. *Ibid*.

24. Where a deputy sheriff received money on an execution in his hands, and had failed to endorse it on the execution or give credit for it, but afterwards collected the whole amount, without deducting the sum so paid, and afterwards promised to pay the defendant in the execution, if such mistake had been made, *it was held* that the statute only began to run from the time of the promise, not from the time the money was received, or from the time of the failure to pay it over. *Tarkinton v. Hassell*, 5 Ired., 359.

25. In a suit by a principal against an agent, to recover back money entrusted to him to be applied to a special purpose, and which he had failed to so apply, the statute did not begin to run until a demand was made. *Buchanan v. Parker*, 5 Ired., 597.

26. If the act of 1715 will not bar by the lapse of three years, where the defendant is an agent, neither will the act of 1826, because there must be a cause of action subsisting before the time, under either statute, can commence running. *Ibid*. (See Rev. Code, ch. 65, secs. 3 and 18.)

27. The statute does not begin to run against persons claiming a legacy of slaves in remainder, after a life estate in another, until the death of the tenant for life. *Miles v. Allen*, 6 Ired., 88.

28. The statute will not begin to run against one claiming land in remainder after a life estate, until the death of the tenant for life. *Davenport v. Wynne*, 6 Ired., 128.

29. Where money has been received by an agent, a demand, or a misapplication of the money, is necessary before an action can be brought, and the statute of limitations only begins to run from the time of such demand, or from the misapplication. *Waring v. Richardson*, 11 Ired., 77.

30. Where A. was indebted to B., and, for a fair consideration, C agreed in writing to pay the debt to B, and afterwards upon a demand from B. refused to do so, and A was subsequently compelled to pay the debt, *it was held* that, as between A and C, A was to be considered as surety and C as principal, and that the statute of limitations began to run against A's claims on C, not from the date of the agreement, or of C's refusal to pay B, but only from the time when A actually paid the money. *Ponder v. Carter*, 12 Ired., 242.

31. On the compromise of a suit, the defendant agreed to pay the fee of the plaintiff's attorney, which he neglected to do, and the plaintiff was compelled to pay it himself. *It was held* that the statute did not begin to run against the plaintiff's claim until he paid the money, and that it was not necessary to give notice of the payment to the other party to entitle the plaintiff to bring his suit. *Deaver v. Carter*, 12 Ired., 267.

32. An executor's right to the personal property of his testator commences at the death of the testator, and from that time the statute of limitations begins to run against him. *Arnold v. Arnold*, 13 Ired., 174.

33. Where a party claims a title in himself under a conveyance from a *non compos mentis*, and has possession under such alleged title, he does not hold as bailee, but, although the original owner is not barred by such adverse possession, on account of his incapacity, yet when his incapacity is removed, or he dies leaving an executor, the statute begins to run. *Ibid.*

34. Where A in a settlement with B was allowed a credit of a certain sum due from B to C, *it was held* that, in assumpsit for money had and received by C against A, the cause of action was not complete until the plaintiff gave notice to the defendant that he accepted him as his debtor, and the statute did not begin to run until such notice was given. *Carroway v. Cox*, Busb., 173.

35. A put into the hands of B for collection a claim against C and D, and a judgment having been obtained thereon, and a *fi. fa.* levied on the property of C, A, B and C met at the house of C on the day appointed for the sale, when C paid to B one-half of the debt, which was immediately paid to A, and it was agreed between B and C, in the presence of A, that B should pay the residue of the debt to A, and if it should not be collected out of D, C would repay it to B, and shortly after C paid the residue to B. In an action by A against B, *it was held* that what had

taken place at the house of C was equivalent to a demand by A for a payment from B, and, therefore, the statute began to run from that time. *Daniel v. Whitfield*, Busb., 294.

36. Where a person had been appointed executor, but did not qualify or renounce, *it was held* that he could not set up an adverse possession of a slave under a bill of sale obtained from the testator before his death, until some one qualified as executor or administrator, and that the statute of limitations would not begin to run until such qualification and a demand, when no adverse possession of the slave had commenced in the testator's life time. *Johnson v. Arnold* 2 Jones, 113.

37. Where one receives money as agent for another, no cause of action accrues until a demand is made, and consequently the statute begins to run only from that time. *Hyman v. Gray*, 4 Jones, 155.

38. On a breach of a warranty of the soundness of a slave, the statute begins to run from the time when the contract of warranty was made, and not from the time when the injury befalls the purchaser, arising from the unsoundness. *Baucum v. Streater*, 5 Jones, 70.

39. Where a female slave is held adversely and has a child born during the time, the statute will not begin to run as to the child but from the time of its birth. *Houston v. Bibb*, 5 Jones, 83.

40. Where the plaintiff, living in Virginia, had put a note into the hands of the defendant, who collected it, and it was proved that, at the time of employing another person to demand it of him, the plaintiff said that he had once before sent the defendant's receipt over and got nothing. *It was held* that this did not amount to the proof of a demand made more than three years before the bringing of the suit, so as to put the statute in motion. *Brooks v. Walters*, 8 Jones, 428.

See (Ejectment—Trespass for *mesne* profits, 1.) (Husband and Wife—Husband's interest in his wife's estate, 12.) (Surety and Principal, 9.)

II. WHEN THE STATUTE WILL, OR WILL NOT, BAR IN PERSONAL ACTIONS.

1. An acknowledgment to an executor will prevent the bar of the statute, as well as when made to the testator. *Billews v. Boggan*, 1 Hay., 13, (18.)

2. To repel the statute, there must be an acknowledgment of the debt, not simply of a fact which may show that the debt is unsatisfied. *Ferguson v. Taylor*, 1 Hay., 20.

3. A defendant wrote the plaintiff: "I would rather come to a settlement, although I should allow the account as insisted on by you, than wait the event of a lawsuit;" and *it was held* that these words took the case out of the statute. *Ferguson v. Fitt*, 1 Hay., 239, (274.)

4. A direction by will, that the testator's just debts should be

paid, was held to prevent the operation of the statute of limitations. *Anonymous*, 1 Hay., 243, (279.) (Overruled; see *Walker v. Campbell*, 1 Hawks, 304.)

5. The time between the 6th of March, 1773, and the 1st of June, 1784, is not computed in this state, in questions on the statute of limitations. *Slade v. Smith*, 1 Hay., 248, (286.)

6. The statute cannot be pleaded by any other person than the defendant. *Anonymous*, 1 Hay., 459, (528.)

7. The expressions as to a note: "It was at the desire of my mother I gave it; I will not pay it; Rosser ought to pay it; I will speak to him about it:" held to take the case out of the operation of the statute. *Cobham v. Mosely*, 2 Hay., 6, (151.)

8. The words: "I have credited him in my account with the value of the certificates; if he will meet me at Newbern I will settle with him:" held to take the case out of the statute. *Toomer v. Long*, 2 Hay., 18, (169.)

9. If a suit be brought before the three years have expired and there be a non-suit, the plaintiff may sue again within twelve months, and then only the time elapsed before the first action shall be counted. *Anonymous*, 2 Hay., 63, (231.)

10. If the new action be not commenced within twelve months after the non-suit, then the time elapsed during the pendency of the former suit shall be counted. *Ibid*, S. P., *Pearce v. House*, *Ibid*, 386, (588.)

11. If the plaintiff produce an account, in which he has given the defendant credit for an article within three years, and the defendant claim advantage of the credit, and examine testimony to show that it ought to have been more, it will be considered equivalent to his keeping an account against the plaintiff, and prevent the statute from barring the plaintiff's account. *Newsome v. Person*, 2 Hay., 242, (427.)

12. A reference to arbitration will take a case out of the statute. *Colking v. Tackston*, Conf. Rep., 93, (225.)

13. An action of debt on a promissory note not under seal is not barred by the statute. *Johnston v. Green*, 1 Car. L. R., 516, (129.) (Altered, see Rev. Code, ch. 65, sec. 3.)

14. When the wife was an infant at the time the act of 1806, relative to parol gifts of slaves, began to run, and became covert during her infancy, the act cannot be set up against a suit brought by her husband and herself. *Allen v. Gentry*, 2 Car. L. R., 609, (411.)

15. An action of assumpsit by a husband and wife, for money earned by the wife before marriage, will be barred by the statute after three years, notwithstanding the coverture, because, the cause of action having arisen before marriage, the statute cannot be stopped by the coverture. *Killian v. Watt*, 3 Murph., 167.

16. The statute limiting penal actions contains no saving of any kind, and, therefore, a second action cannot be brought with-

in twelve months after a non-suit in the first, in order to save it from the operation of the statute. *Clark v. Rutherford* 3 Murph., 237. (See Rev. Code, ch. 65, secs. 3 and 8.)

17. The act of 1814 did not allow three years after its passage for bringing actions of debt upon simple contracts, where the cause of action then existed, but limits the bringing of the action to "three years after the cause of action accrued." *Sharpe v. Jones*, 3 Murph., 306. (See Rev. Code, ch. 65, sec. 3.)

18. Whenever the statute is a bar to the recovery of one of the plaintiffs to an action of detinue, it operates against all, because the disability of one does not save the rights of others. The statute protects the rights of those who are incompetent to protect themselves; but when some of the parties are competent, they ought to take care of the interest of all, by bringing suit within time. *Riden v. Frion*, 3 Murph., 577. (One joint owner of personalty may now be barred without affecting the others. Rev. Code, ch. 65, sec. 21.)

19. A debt barred by the statute of limitations is not revived by a direction in the debtor's will, that certain property be sold, "and with the proceeds thereof, after paying my debts, they," &c. *Walker v. Campbell*, 1 Hawks, 304.

20. An acknowledgment by one partner, made *after* the dissolution of the firm, will prevent the operation of the statute on a claim existing against the partnership. *McIntire v. Oliver*, 2 Hawks, 209. (Altered; see Rev. Code, ch. 65, sec. 22.)

21. It is a good replication to a plea of the statute, that the plaintiff brought his action within a year after a non-suit, and that the cause of action is the same. *Shillington v. Allison*, 2 Hawks, 347. (See Rev. Code, ch. 65, sec. 8.)

22. The acknowledgment, which will take a case out of the statute, must be one of a present subsisting debt. Hence, where a defendant, in an affidavit for a continuance, stated "that the action was founded on his guaranty, and by the absent witness he expected to prove such *laches* on the part of the plaintiff as to discharge him from his engagement," *it was held*, that there was no acknowledgment sufficient to take the case out of the statute. *Bank of Newbern v. Snead*, 3 Hawks, 500.

23. Cumulative disabilities will be allowed; hence, if an infant have cause to sue in detinue for a slave, and marry before coming to full age, her coverture will protect her from the operation of the statute. *Davis v. Cooke*, 3 Hawks, 608.

24. When a parent puts a slave into the possession of a child, without an express parol gift, this possession is not adverse, and does not divest the title of the parent or bar his action. *Justice v. Cobbs*, 1 Dev., 469.

25. The acts of 1715 and 1814 do not bar the action given against justices of the peace by the act of 1790. *Governor v.*

McAffee, 2 Dev., 15. (See Rev. Code, ch. 65, sec. 3 and ch. 78, sec. 7.)

26. The proviso in the 6th section of the act of 1715, whereby the operation of the statute is suspended upon a judgment for the plaintiff and its reversal for error, or upon an arrest of judgment on a verdict in his favor, provided he bring a new action within a year, has been extended by construction to the cases of an abatement and a non-suit. The proviso is founded on the idea of merits in the plaintiff, though inartificially ascertained; and its extension, by construction, to an abatement and nonsuit is based upon the fact that the merits are indifferent, and the plaintiff has been diligently endeavoring to assert them. *Morrison v. Connelly*, 2 Dev., 233.

27. The act of 1820, for quieting the title of persons in possession of slaves, does not pass the title to a donee, who has been in possession three years under a gift void by the act of 1806. *Palmer v. Faucit*, 2 Dev., 240. (See Rev. Code, ch. 65, sec. 20, and ch. 37, sec. 17.)

28. The proviso in the act of 1820, for quieting the title to persons in the possession of slaves, extends not only to gifts of slaves void by the act of 1806, but also to those which are void by the act of 1784. *Peterson v. Williamson*, 2 Dev., 326.

29. In order to take a case out of the statute of limitations, the new promise or acknowledgment must be an express promise to pay a particular sum, absolutely or conditionally, or an admission of facts from which the court can infer an obligation for a certain sum, or that the parties are willing to account and to pay the balance when ascertained. Hence, mere vague declarations, from which the court and jury can only surmise that the defendant possibly meant to admit himself a debtor for some undefined amount, and without reference to any thing that can make it certain, are not sufficient; as where a defendant admitted that there ought to have been a settlement between him and the plaintiff, and added "but little if any thing was due." *Peebles v. Mason*, 2 Dev. 367.

30. Actions on justices' judgments, which were barred by the act of 1820, were not revived by the act of 1825, which extended the time of limitation to seven years. *Taylor v. Harrison*, 2 Dev., 374. (See Rev. Code, ch. 65, sec. 6.)

31. The act of 1786, respecting endorsed bonds, limits only the action on the case given to the endorsee; but when a bond, after being endorsed, became again the property of the obligee, there is no statute limiting his action of debt. *Phifer v. Giles*, 2 Dev., 498. (See Rev. Code, ch. 65, sec. 3.)

32. In debt upon simple contract, a replication of a new promise within three years is no answer to a plea of the statute of limitations. *Morrison v. Morrison*, 3 Dev., 402.

33. When the plaintiff, to rebut the plea of the statute of limi-

tations, proved that the defendant's testator, in his last sickness, sent for him, and expressed great anxiety to adjust an unsettled account between them, and upon being disappointed, made entries of credits to which he was entitled, but it was not proved that he admitted a balance to be due to the plaintiff. *It was held* that the evidence was not sufficient to authorize a verdict for the plaintiff, but that it should be left to the jury, with instructions to find for the defendant, unless the testimony proved the testator to have been willing that the accounts should be settled after his death. *Ballenger v. Barnes*, 3 Dev. 460.

34. Although no *laches* are imputed to the State, and as to it the rule is *nullum tempus occurrit*, yet this is not the case as to those bodies to whom the execution of public trusts is confided; and where the county court brought an action of *assumpsit* against a treasurer of public buildings, *it was held* that the statute might bar. *Armstrong v. Dalton*, 4 Dev., 568.

35. The possession of slaves for more than three years, by the trustees of a religious society, for its benefit exclusively and against the rights of all others, is a bar to an action of detinue for the slaves, notwithstanding the society considers slavery as sinful, and holds the slaves for the purpose of giving them the advantages of freemen; because the cause of action arose from the conversion, and not from the intent with which it was made. *White v. White*, 1 Dev. and Bat., 260.

36. The mere existence of disconnected and opposing demands between two parties, one of which demands is of recent date, will not take a case out of the statute. There must be mutual running accounts, having reference to each other, between the parties, for an item within time to have that effect. *Green v. Caldcleugh*, 1 Dev. and Bat., 320.

37. By the act of 17 5, one year is the limitation to an action of trespass *vi et armis* to personal property. *Swink v. Fort*, 2 Dev. and Bat., 133. (The limitation to such an action is now three years. See Rev. Code, ch. 65, sec. 3.)

38. A count, in a declaration for goods sold and delivered by the plaintiff, embraces equally the original promise, implied by the law from the delivery of the articles, and a subsequent express promise to pay for them; because the time of the promise does not constitute a material part of the contract declared on. Hence such subsequent promise, if made within three years, may be proved in support of the declaration, and to repel the plea of the statute of limitations. *Finn v. Fitts*, 2 Dev. and Bat., 236.

39. When two persons having opposing claims to certain slaves, both bail them to a third person, the possession of the bailee is not such a possession of either claimant, as to divest the better title under the act of 1820, and give it to the other party. *Hamlin v. Alston*, 2 Dev. and Bat., 263. (See Rev. Code, ch. 65, sec. 20.)

40. An acknowledgment or promise, to repel the statute of limitations, must be distinct and explicit, and plainly refer to the debt in question; and where the plaintiff's claims consisted of two debts only, one of which was barred, a letter from the defendant to him as follows: "I do now and have always appreciated your favors and kindness to me; and they shall not go unrewarded by me; but I shall want some little time to meet your demand," is too vague to entitle the plaintiff to recover, as it may apply only to the debt which was not barred. *Smallwood v. Smallwood*, 2 Dev. and Bat., 330.

41. A promise to pay a debt barred by the statute of limitations revives the old contract, or is evidence of similar continuing promises from the time the contract was made. Hence it follows that the first promise should be declared on; and if the new promise be made after the writ is sued out, the plaintiff may recover. *Falls v. Sherril*, 2 Dev. and Bat., 371.

42. If a new promise, taking a case out of the statute, be made by or to an executor then the action must be brought on it. *Ibid.*

43. When the new promise is conditional, upon the performance of the condition it is evidence of a previous absolute promise. *Ibid.*

44. Where the guardian of a lunatic, under an order for the sale of the lunatic's property, became the purchaser of a slave, and upon the lunatic's becoming of a sound mind, settled with him, and obtained a receipt for "all demands," and afterwards retained possession of the slave for more than three years, it was held that, although the purchase gave the guardian no title, the settlement and receipt were evidence of a demand for the slave, and that the subsequent possession was adverse, and barred the action of the lunatic. *Boyce v. Warren*, 2 Dev. and Bat., 498.

45. The possession of a slave by a donee, under the act of 1806, is that of a bailee, and no length of such possession will bar the title of the donor; but if he demand possession, and the donee refuse to deliver up the slave, claiming him as his own, his possession will then become adverse to the donor, and after three years will bar his action. *Martin v. Harbin*, 2 Dev. and Bat., 504.

46. In order to repel the statute of limitations, there must be either an express promise to pay, or an explicit acknowledgment of a subsisting debt. *Mastin v. Waugh*, 2 Dev. and Bat., 517.

47. In order to repel the statute, there must be either an express promise to pay, or an explicit acknowledgment of a subsisting debt from which the law can imply a promise to pay it. But if the debtor, at the time he acknowledges the debt, refuses to pay it, or offers to pay a smaller sum, saying that if his offer is not accepted he will plead the statute, there is nothing from which the law can imply a promise to pay the debt,

and it will not be taken out of the operation of the statute. *McGlensy v. Fleming*, 4 Dev. and Bat., 129.

48. Wherever the statute is a bar to the recovery of one of several parties, plaintiffs in an action of detinue, it will operate against all, though the others were under the disability of infancy. *Montgomery v. Wynns*, 4 Dev. and Bat., 527. (In such case the bar of one will not now bar those under disability. See Rev. Code, ch. 65, sec. 21.)

49. Probably if there be an explicit acknowledgment of a debt, and a distinct admission that it has not been paid but still exists, and nothing more be said about the mode or time of payment as proposed by the debtor, or of his objection to pay upon the ground of the statute of limitations, or some other defence, then such unqualified admissions might go to the jury as evidence of a new promise. But if the language of the party be so vague and indeterminate, as not in itself to amount to a promise, or to satisfy the mind, either from its own terms, or something referred to, what the party meant to engage, there is nothing to repel the statute. *Wolfe v. Fleming*, 1 Ired., 290.

50. To repel the bar created by the statute, the words ought not to leave the meaning in doubt, but should clearly indicate the intention to assume or renew the obligation for the debt. Hence, where it was proposed to the defendant that if he would pay the principal, the interest should be forgiven, and he declined the proposition, and in turn, requested the witness to buy the debt, (which was about \$655 principal, and about \$180 interest,) for \$500, and expressed the opinion that the creditor would accept that sum, *it was held* that these words did not take the case out of the statute; that this language imported more an offer of compromise, than a promise to pay the debt. *Ibid.*

51. Proof that the defendant said at one time, "he owed the plaintiff right smart of money," and at another, "he owed him the biggest debt he owed to any person," will not take a case out of the statute.—*Rainey v. Link*, 3 Ired., 376.

52. A plaintiff, having recovered a judgment against a person, issued a *sci. fa.* against his bail, to which the bail pleaded that no *ca. sa.* had issued against his principal, and the issue thereon was found in his favour. The plaintiff, then, after the expiration of some years from the rendition of the judgment against the principal, issued another *sci. fa.* against the bail, to which the latter pleaded the statute limiting the time within which a *sci. fa.* should issue against bail, *it was held* that the time, during which the former proceedings against the bail were pending, should not be deducted from the computation of the time within which the *sci. fa.* was to be sued out. *Deviney v. Wells*, 4 Ired., 30.

53. The bailee of slaves, where there is nothing to change the relation, will not hold them adversely to the bailor nor to his

executors, but if, upon the assent of the executors, there be a settlement of the estate among all the legatees, and the bailee of the slaves be permitted to take and keep them as his own upon the supposition that they belong to him, his possession will become adverse from the time of the settlement and, if continued for three years, will bar the claim of the executors. *Simpson v. Boswell*, 5 Ired., 49.

54. An act or acknowledgment by one partner, after the dissolution of the partnership, which prevents the operation of the statute as to that partner, will also prevent its operation as to the other partners. *Walton v. Robinson*, 5 Ired., 341. (Altered. See Rev. Code, ch. 65, sec. 22.)

55. Making a payment on a promissory note repels the statute. It is assuming the balance anew. *Ibid.*

56. A legal presumption of the satisfaction of a simple contract arises only on the expiration of ten years from the time the cause of action accrued; therefore, when the action was upon a receipt of the defendant's testator, who was a constable, for notes belonging to the plaintiff to collect, and it did not appear by any actual proof that any demand had been made by the plaintiff until fifteen years after the date of the receipt, but this demand was made within three years before the bringing of the action, *it was held* that the judge erred in instructing the jury, that though there was no demand before the one proved, and therefore the ordinary statute of limitations could not run, yet that after the lapse of ten years from the date of the receipt the law presumed the claim settled, unless the contrary appeared. But he might properly have left to the jury the great length of time which had elapsed, as a circumstance from which they might have inferred, that either a settlement had been made, or that there had been a demand for a settlement so long ago as to let in the operation of the statute of limitations. *Spruill v. Davenport*, 5 Ired., 663.

57. A payment, made by one of the makers of a promissory note within three years, will take the debt out of the statute of limitations as to all. *Davis v. Coleman*, 7 Ired., 424. (It would not now have such an effect. See Rev. Code, ch. 65, sec. 22.)

58. Where slaves are bequeathed, the statute of limitations, in behalf of one who has purchased them from a stranger and kept them in possession the requisite time, gives a title against the executor, and a subsequent assent by him to the legacy will not enable the legatees to sustain an action for the slaves at law. *Bennett v. Williamson*, 8 Ired., 121. (See Rev. Code, ch. 65, sec. 20.)

59. The saving in the statute as to slaves is meant for one who has an original cause of action at law. *Ibid.*

60. To take a case out of the statute, the promise or acknowledgment must be an express promise to pay a particular sum

either absolutely or conditionally; or such an admission of facts as clearly shows, out of the party's own mouth, that a certain balance is due, from which the law can imply an obligation and promise to pay; or that the parties are yet to account, and are willing to account and pay the balance then ascertained. *Sherrod v. Bennett*, 8 Ired., 309.

61. In an action for harboring a slave, to which the statute of limitations was pleaded, the plaintiff could not prove any act of harboring within three years before suit brought, but proved that the defendant had harbored the slave for several years before that period. *It was held* that there was no evidence that there was any harboring within three years, to prevent the bar of the statute. *Barnes v. Farmer*, 9 Ired., 202.

62. To repel the statute, a promise to pay must be proved, either express or implied. And the law will imply a promise, where there is an acknowledgment of a subsisting debt, unless there be something to rebut the implication. *Smith v. Leeper*, 10 Ired., 86.

63. If one pay a debt in part, the law implies a promise to pay the balance, in the absence of any circumstance to negative such a promise. *Ibid.*

64. Where the copy of an account was shown to the defendant, and she said, "she had no money, but would call in a few days and settle it," and that she did not intend to cut him out of it," *it was held* that this was an explicit acknowledgment of a subsisting debt, from which a promise to pay might be implied, if indeed there was not evidence of an express promise. *Ibid.*

65. Where only one, of several tenants in common of a negro, sues in tort, the statute cannot, if he were under disability, operate upon him, even though it might against all, if his cotenants, against whom it was available, had joined in the action. *Quere*, how it would be, if the objection had been taken by a special plea. *Weare v. Burge*, 10 Ired., 169. (One joint owner may now be barred while the others are not. See Rev. Code, ch. 65, sec. 21.)

66. A promise of a party that he will settle with another will only take a case out of the statute of limitations, when it clearly appears that the promise referred to the particular claim. *Arey v. Stevenson*, 11 Ired., 86.

67. A new promise will not prevent the bar of the statute to a suit on a justice's judgment; for the replication of a new promise to a plea of the statute is confined to actions "on promises." *Taylor v. Spivey*, 11 Ired., 427.

68. After a debt had been barred by the statute, the debtor said to the creditor, "unless J. R. has paid it for me, it is a just debt and I will pay it;" and again "it is a just debt and I will pay it, if I cannot prove that it has been settled by J. R.," *it*

was held that the debt was thereby taken out of the statute, and that by such declarations the *onus* of proof that the debt had been paid rested on the defendant. *Richmond v. Fugua*, 11 Ired., 445.

69. When a plaintiff, in order to bar the operation of the statute, gives in evidence words used by the defendant, the language must be such as, without straining, imparts a willingness and intention thereby to assume the debt, or amounts to an unequivocal acknowledgment of its subsistence and obligation. *Taylor v. Stedman*, 11 Ired., 447.

70. In a conversation between the plaintiff and the defendant in relation to the matter in dispute, the former said to the latter, "that matter about Frank's hire in 1842 must be fixed," when the latter asked, "will not other notes or judgments do instead of mine?" and the plaintiff remarked "yes, if they are good," when nothing further passed between them, *it was held* that the defendant's expressions did not revive the debt, and bar the operation of the statute. *Ibid.*

71. In detinue by a husband and wife for a slave, when it appeared that the slave had been given to A for life, and after her death to the *feme* plaintiff, who, at the death of the tenant for life, was an infant and married, and had never since been discovered, *it was held* that the action was not barred by the statute of limitations. *McLean v. Jackson*, 12 Ired., 149.

72. In an action of assumpsit, brought for a certain sum of money agreed to be paid, it is no bar to the plea of the statute of limitations, that the defendant within three years promised to pay the debt in good notes or judgments, which promise was accepted by the plaintiff. *Taylor v. Stedman*, 13 Ired., 97.

73. Where a *sci. fa.* on a judgment is issued, and the plaintiff is nonsuited, and issues a second *sci. fa.* within the time prescribed in the statute of limitations, a variance between the latter and the former is not material, if both be for the same cause of action and between the same parties. *Trice v. Turrentine*, 13 Ired., 212.

74. To repel the statute, a promise must be either for a sum certain, or for that which may be, and afterwards is, reduced to a certainty. *Moore v. Hyman*, 13 Ired., 272.

75. A brought a suit against B for a certain amount of herrings placed with him for sale, and the parties disagreed about six barrels for which B claimed a credit. B asked A "why he sued?" To which the reply was, "for a settlement," to which B said, "we are willing to settle and always have been willing;" and the matter was then, by agreement, referred to arbitrators who never decided; and the statute being pleaded, *it was held* that the promise implied in the words used was uncertain as to the sum, that sum never having been ascertained in the mode agreed

on, and the promise was too vague to have any legal effect. *Ibid.*

76. To take a case out of the statute of limitations, the promise must be certain or capable of being reduced to a certainty, and the claim sued on identified, as that in regard to which the promise was made. Hence, where an account was presented to the defendant and he said "I reckon it is correct, but I have sets off against it, and would rather settle with the plaintiff myself," and the witness could not say certainly that the account exhibited on the trial was that which was presented to the defendant, *it was held* that this was not sufficient to repel the bar of the statute. *Shaw v. Allen*, Busb., 58.

77. A vague admission of indebtedness, or a promise to pay an indefinite sum, will not repel the bar of the statute; e. g., a declaration of the defendant that he intended to pay the plaintiff for his services, no sum being named and no account being referred to, or other matter by which the amount might be reduced to a certainty. *McBride v. Gray*, Busb., 420.

78. The six months, within which an action on the case for words spoken must be brought, are lunar and not calendar months, under the act Rev. Stat., ch. 65, sec. 3. *Rives v. Guthrie*, 1 Jones, 84. (See Rev. Code, ch. 65, sec. 3; but now by the Rev. Code, ch. 108, sec. 2, par. 3, a month is to be taken, when used in a statute, to mean a calendar month unless it is otherwise expressed.)

79. To take a claim out of the operation of the statute of limitations, there must be a promise, express or implied, to pay a certain and definite sum, or an amount capable of being reduced to a certainty by reference to some paper, or by computation, or in some other infallible mode, not depending on the agreement of the parties, or the finding of arbitrators or a jury. *McRae v. Leary*, 1 Jones, 91.

80. A promise to pay such sum as the plaintiff might deem just, when he should bring forward his account, will not repel the bar of the statute. *Long v. Jameson*, 1 Jones, 476.

81. Where an agent of the plaintiff, having in his possession several notes and an account against the defendant, demanded payment, but did not show him the account nor state its amount, and the defendant replied that "he had claims against the plaintiff and would see him and settle," and another agent presented him the account together with certain notes, but the defendant did not examine the account, and the agent did not tell him the amount of the account, though he did tell him the amount of both notes and account, to which defendant said "he would call at plaintiff's store and settle, or attend to it;" *it was held* that neither of these declarations of the defendant amounted to a recognition of any certain debt, so as to take the account out of the operation of the statute. *Loflin v. Aldridge*, 3 Jones, 328.

82. The act of 1852, ch. 51, sec. 2, providing "that the time, during which the parties to a suit shall not have been resident in this state, shall not be given in evidence in support of the plea of the statute of limitations," did not apply to and revive claims barred before its passage. *Phillips v. Cameron*, 3 Jones, 390. (The act of 1852 was not re-enacted in the Rev. Code; see ch. 65.)

83. To say of actionable words spoken, which were barred by the statute of limitations, "I never denied speaking those words, and I will stand up to them," is only an acknowledgment by the defendant that he had spoken the words, and not a repetition of them, which if made within six months would prevent the bar of the statute. *Fox v. Wilson*, 3 Jones, 485.

84. Where an unsealed note, payable to bearer, was transferred by delivery to several holders successively, and after three years from its maturity a suit was brought on it, *it was held* that a new promise, made to a previous holder, could not avail a subsequent holder to repel the statute. *Thompson v. Gilreath*, 3 Jones, 493.

85. When an action of *debt* is brought on a simple contract, no subsequent promise, however explicit, can be relied on to take it out of the operation of the statute of limitations. *Brannock v. B. Rhinell*, 4 Jones, 33.

86. Where there was an agreement to pay a debt in good cash notes, which was barred by the statute of limitations, and afterwards, within three years before the bringing of the suit, the debtor, who was applied to for a certain balance alleged by the plaintiff to be still due, said he would "settle and make all right in good cash notes," to which the plaintiff assented, *it was held* that as the original and new promise were made between the same parties and were to do the same thing, the bar of the statute was repelled; and that in such case the replication to the plea of the statute was a general and not a special one. *McCurry v. McKesson*, 4 Jones, 510.

87. As a promisory note payable on demand is due immediately, it will be barred by the statute after three years. *Caldwell v. Rodman*, 5 Jones, 139.

88. Where the account, on which an action was brought, was read over to the defendant, who said "he supposed it was right, and was willing to settle, and give his note, but he thought the plaintiff had not given him all the credit to which he was entitled," *it was held* that there was nothing in this expression to rebut the statute. *Mills v. Taber*, 5 Jones, 412.

89. The act of 1848, Rev. Code, ch. 65, sec. 10, saving causes of action against non-residents from the operation of the statute of limitations, applied to causes of action existing at the time when the act went into effect, provided they had not then been

barred by a previous act of limitations. *Cox v. Brown*, 6 Jones, 100.

90. The bar of the statute of limitations is not repelled by the sending of a draft by the debtor and its receipt by the creditor within three years, if the debtor did not make any allusion to, or recognition of the account, or any debt whatever. *Hussey v. Burgwyn*, 6 Jones, 385.

91. When, in an account consisting of several items, the last is within three years before suit, the effect will not be to bring the whole account within date, unless it appear that there were mutual accounts between the parties, or an account of mutual dealings between them kept by one with the knowledge and concurrence of the other. *Ibid.*

92. A request by the endorser of a promissory note, made *before it was barred* by the statute of limitations, that the endorsee would collect it or release him soon, is not an acknowledgment from which a new promise to pay can be implied, so as to repel the bar of the statute. *Vass v. Conrad*, 7 Jones, 87.

93. A judgment of *non-suit* is within the equity of the *proviso* to the 8th section of the 65th chapter of the Revised Code, and the plaintiff may commence a new action within a year after the termination of the first. *Freshwater v. Baker*, 7 Jones, 255.

94. Where, upon the transfer of a note, an endorsed credit was overlooked, so that the endorsee of the note paid the full amount called for in the face of the paper, and afterwards on being applied to, the endorser corrected the mistake and paid back the amount of the credit which had been overlooked, *it was held* that this was no promise express or implied to pay the note nor an acknowledgment of a subsisting debt, so as to repel the bar of the statute. *Gilmer v. McMurray*, 7 Jones, 479.

95. Where a statute incorporating a company gave, as a remedy for the recovery of the subscription of stock, a sale of the stock within three years after an assessment, and then a suit for the balance due, *it was held* that the statute of limitations would not bar the suit until three years after the sale of the stock, because no balance could be ascertained until such sale. *Cape Fear and Deep River Navigation Company v. Wilcox*, 7 Jones, 481.

96. The time which elapsed during the residence of a party in another state, while the act of 1852, ch. 51, sec. 2, was in force, *was held* not to operate as a bar under the statute of limitations, though that act was repealed before the statute of limitations was pleaded. *Doggett v. Mosely*, 7 Jones, 587.

See (Executors and Administrators—Of suits by executors and administrators, 11.) (Executors and Administrators—Of refunding bonds taken from legatees and next of kin, 2.) (Husband and Wife—Of actions by and against husband and wife, 12.)

(Limitations—When the statute begins to run.) (Practice—Discontinuance—Death of the parties, 6.)

III. LIMITATION OF ACTIONS ON OFFICIAL BONDS.

1. Where a suit on sheriff's bond was suffered to abate as to one of the sureties who died, although a *sci. fa.* against his representatives was ordered, and was dismissed as to the other parties after having pended for many years; but before this dismissal, though after more than three years had elapsed since the death of the surety, another action was brought against his representatives, *it was held*, that the statute barred the action under the act of 1810, notwithstanding the pendency of the former suit or the order for the *sci. fa.* *Governor v. Franklin*, 3 Murph., 213 (Suits on bonds of sheriffs are now barred after six years. Rev. Code, ch. 65, sec. 5.)

2. An action on a sheriff's official bond, which is barred by the statute, cannot be revived by a promise to pay within three years, whatever remedy there may be, if any, on the promise itself. *Governor v. Hanrahan*, 4 Hawks, 44.

3. A suit on the official bond of a sheriff, who has been fixed with the payment of a certain amount as special bail, is not barred so as to protect his sureties, until six years after final judgment against him as bail. *Barker v. Munroe*, 4 Dev., 412.

4. An action commenced by a warrant against the sureties of a constable for money collected by him, under the Rev. Stat., ch. 81, sec. 3, can be barred only by the length of time that bars an action on the constable's bond. *Wilson v. Coffield*, 5 Ired., 513. (See Rev. Code, ch. 78, sec. 4.)

5. Where a constable receive claims on solvent persons to collect, in February, 1842, and the suit on his official bond was commenced in October, 1848, *it was held* that the suit was not barred by the statute. *State v. Patton*, 13 Ired., 421.

6. The act of limitation as to official bonds, Rev. Stat., ch. 65, sec. 8, bars the action on the bond of a clerk brought for his not paying over fines and forfeitures, if not commenced within six years from the end of three months after he has received them, and not within six years from the time when a demand was made for them. *Little v. Richardson*, 6 Jones, 305. (See Rev. Code, ch. 65, secs. 5 and ch. 28, secs. 6 and 7.)

IV. EFFECT OF THE STATUTE UPON THE TITLE TO SLAVES.

1. An adverse possession of a slave for three years confers on the possessor a complete title to the slave. *Call v. Ellis*, 10 Ired., 250. (The same principle is now extended to "other personal property." See Rev. Code, ch. 65, sec. 20.)

2. An adverse possession for three years of one, who is in fact

a slave, will confer a title on the possessor, though he may think the slave to have been free, and only kept him until some person could show a good title to him as a slave. *State v. Jones*, 11 Ired., 154.

3. If a parent places a slave in the possession of his child upon his or her marriage, and afterwards bequeaths the slave to a third person, the possession of the child upon the death of the parent will become adverse to the legatee, and if continued for more than three years, will confer the title upon the possessor. *Cotten v. Davis*, 4 Jones, 416.

4. Where a slave was placed by a father in the possession of his daughter, and remained there until his death, after which an issue was made up to try the validity of his will, which pended eight years, when the will was established, *it was held* that a demand made by the administrator *pendente lite*, and a refusal, did not make the daughter's possession adverse to the right of the executor, and that he was not barred by the possession for more than three years under such circumstances. *Wooten v. Jarman*, 6 Jones, 111.

5. Where a person takes possession of slaves as a bailee, and afterwards continues to hold them, claiming them as his own, but without doing any *act* to change the nature of his possession, he cannot acquire a title to them under the statute of limitations. *Koonce v. Perry*, 8 Jones, 58.

See (Gifts—Of slaves since the act of 1806, 7-13-14.) Slaves—Sales and gifts of slaves, 16.)

V. AS TO SUITS AGAINST EXECUTORS, ADMINISTRATORS, HEIRS AND DEVISEES.

1. These words used by one of two administrators when the note of his intestate was presented: "it is the signature of the deceased, and all his just debts shall be paid when the Holly Shelter lands shall be sold," were held to take the case out of the statute of limitations. *Cobham v. Creedon*, 2 Hay., 6, (152.)

2. The statute begins to run only from the time when letters of administration are first obtained. *Tyson v. Simpson*, 2 Hay., 147, (321.)

3. The act of 1715, barring claims against deceased persons' estates, is in force. *Young v. Farrell*, 2 Hay., 219, (392.) S. P. *Dry v. Roper*, Conf. Rep., 311, (397.) (But it was held to be repealed by the act of 1789, in *Ogden v. Witherspoon*, 2 Hay., 227, (404.) It was expressly continued in force by the act of 1799. See Rev. Code, ch. 65, sec. 11.)

4. It seems that the admission of a debt of the intestate by an administrator will not take the case out of the statute of limitations. *Wilkins v. Murphy*, 2 Hay., 282, (460.)

5. The act of 1715, (see Rev. Code, ch. 65, sec. 11,) requiring

creditors of a deceased person to make their claim within seven years after the death of the debtor, makes no saving for any description of person, and where the act makes none the court cannot make any. *Ridley v. Thorpe*, 2 Hay., 34, (525.)

6. If the first seven years after the death of the debtor cannot, for any cause, be computed, the next seven may. *Ibid.*

7. The act of 1715, while it was unrepealed, was suspended in its operation by the acts disqualifying British adherents from suing in our courts. It did not begin to operate as to such persons till the end of the war, and then if the seven years were not completed before it was repealed (if it were so, qu.,) by the act of 1789, no bar could ever be operated under it. — *v. Lewis*, 2 Hay., 346, (530.)

8. A plea of the statute of limitations, not being a plea to the merits, shall not be added after the pleadings are once made up; therefore an executor will not be allowed to add the plea of the act of 1715, if he neglect it at first. *Campbell v. Hester*, Tay. 78, (54.) (Qu., and see *Reid v. Hester*, Conf. Rep. 488, (540,) and other cases.)

9. The act of 1715 will bar a debt due on bond, though there be no person entitled to sue. *McClellan v. Hill*, Conf. Rep. 479, (532.) (See this case corrected in *Jones v. Brodie*, 3 Murph., 594.)

10. The act of 1715 will bar an action by a county trustee against the executors of a county ranger, for money received in that character by their testator, where more than seven years had elapsed from his death to the bringing of the action. *Alexander v. Alexander*, 1 Car. L. R., 273, (28.)

11. Where a lessee for fourteen years covenanted in an indenture of lease to pay an annual rent during the term, and died at the expiration of four years, *it was held* in an action against his executors, brought soon after the term had expired, for the rent which had never been paid, that the suit was barred by the act of 1715, because the action was founded upon the possession of the testator, and his permanency of the profits, and the executors were liable only as his representatives. *Neil v. Hosmer*, 1 Murph., 202.

12. The act of 1789 cannot be pleaded and relied on in an action of debt, brought against the devisees on the bond of their devisor. *Hollowell v. Pope*, 2 Murph., 108, S. C. 1 Car. L. R. 221, (17.) (See Rev. Code, ch. 65, sec. 12.)

13. The words of the act of 1789 do not provide any limitation for suits brought against heirs and devisees, nor are they within its equity or spirit. The act of 1715 (see Rev. Code, ch. 65, sec. 11,) was intended to protect the heir and every part of the estate from the demands of creditors, and, therefore, fixes the death of the debtor as the period from which the time is to be computed, and does not require the demand to be made of the

executor, but leaves the enquiry from whom the demand is to be made to be determined by the nature of the debt itself. If by the nature of the contract the heir is liable, the demand may be made either of him or the executor. If the heir be not liable, the demand must be made of the executor only. The act of 1789 was designed to protect the executor from such demands as he alone is liable for in the first instance, or such as the creditor may elect to enforce against him, and therefore fixes the qualification of the executor as the period from which the time is to be computed. *Ibid.*

14. Under the act of 1715, barring the claims of creditors against deceased persons' estates, two circumstances must concur to put the bar in operation, to wit, the death of the debtor, and the simultaneous existence of the creditor. If, therefore, the creditor die before the debtor and no administration be taken out on his estate in the lifetime of the debtor, the act will not bar the claim. When the statute of limitations begins to run, nothing will stop its operation, and if therefore a debtor die in the lifetime of his creditor, whose cause of action has accrued, the act will attach upon the claim of the creditor, although no administration be taken out on his estate for more than seven years. *Jones v. Brodie*, 3 Murph., 594.

15. There being in the act of 1715 no saving of the rights of persons under any incapacity, that act is a bar to the claim of an infant creditor of the decedent, brought more than seven years after his death. *Rayner v. Watford*, 2 Dev., 338.

16. The act of 1715 is a protection both to the executor and the heir, and the act of 1784 (since repealed,) and the act of 1809, directing the surplus to be paid into the treasury and to the University, do not affect the real assets, but only apply to the personal estate, and give a remedy to the creditors, &c., against the State and the University, without affecting the protection given to the executor by the act of 1715. *Ibid.*

17. The statute never begins to run until a cause of action has accrued, as well as until there is a claimant in existence; therefore where the cause of action accrued more than seven years after the death of a testator, the action against his executor was held not to be barred by the act of 1715. *Godley v. Taylor*, 3 Dev., 178.

18. Where an action was brought upon a covenant for quiet enjoyment, made by a decedent, and the eviction took place more than seven years after his death, it was held that the action was not barred by the act of 1715. *Ibid.*

19. If an executor has, after seven years, paid the assets over to the University, he is not subjected for those assets to the claim of a creditor, nor barred by the act of 1715; but the issue of fully administered must be found for him, and the creditor must proceed against the University. *Ibid.*

20. The 4th section of the act of 1789, barring creditors of a decedent who do not bring their suits within two years after the qualification of the executor or administrator, is a defence as well for the next of kin as for the personal representative, and the latter, in pleading it, need not aver that he has delivered the assets to the former and taken refunding bonds. *Goodman v. Smith*, 4 Dev., 450. (See Rev. Code, ch. 65, sec. 12.)

21. Advertisements required before the act of 1806, establishing superior courts in each county, to be made at the district court houses, may be made at the county court houses. *Ibid.*

22. The act of 1715 will not operate as a bar to creditors not suing within seven years from the death of the debtor, when there is no personal representative of the deceased during that time. *McKnider v. Littlejohn*, 1 Ired., 66.

23. Where an action is brought against an obligor and the representative of a deceased obligor, and as to the latter the action is barred by the act barring claims against deceased persons' estates, a judgment may be still recovered against the former, for the act does not extinguish the debt, but only bars the remedy against the person to whom it applies. *Buie v. Buie*, 2 Ired., 87.

24. If, in reply to the plea of an executor of the act of 1789, limiting the time within which actions shall be brought against executors, &c., the plaintiff wishes to avail himself of the *proviso* in that act, that he was requested by the executor not to sue, he must state the fact in a special replication. *Hubbard v. Marsh*, 7 Ired., 204. (See Rev. Code, ch. 65, sec. 14.)

25. Where it appeared that payments were endorsed on the bond declared on, subsequently to the death of the testator, but it did not appear by whom, *it was held* that this did not afford any evidence that the executor had requested delay. *Ibid.*

26. A surviving obligor cannot continue or revive the liability of the estate of a deceased obligor by partial payments, obtaining indulgence, or other means, so as to repel the operation of the act above referred to. *Ibid.*

27. The 17th section of the 46th ch. of the Rev. Stat., in relation to the time in which claims must be presented against administrators, was intended for the ease and security of the administrator, and a strict performance is required on his part. *Lee v. Patrick*, 9 Ired., 135. (See Rev. Code, ch. 46, sec. 23.)

28. Under the act of 1789, an administrator who has made advertisement for creditors to present their claims within two years, but who has not taken refunding bonds from the next of kin on paying the surplus to them, is not protected against the action of the creditor brought after such advertisement and payment over. *Reeves v. Bell*, 2 Jones, 254. (See Rev. Code, ch. 65, sec. 12.)

29. The statute of 1789, (Rev. Code, ch. 65, sec. 12,) which

bars claims against a decedent's estate not sued for in two years, will not protect the executor or administrator, unless he has paid over the assets to the persons entitled, and taken refunding bonds, as well as advertised as required by the statute. *Cooper v. Cherry*, 8 Jones, 323.

See (Executors and Administrators—*Executors de son tort*, 2) (Executors and Administrators—Of their liability to creditors, &c., 24–30.)

VI. AS TO REAL ESTATE.

1. The statute of limitations as to land cannot have any reference to vacant land. *Anonymous*, 1 Hay., 466, (538.)

2. The act of 1791, (Rev. Code, ch. 65, sec. 2,) limiting the claims of the State, is bottomed upon the presumption of a former grant, and, therefore, cannot apply to lands admitted on both sides to be vacant. *Ibid.*

3. If seven years be completed at a period of time occurring after arrival at full age, when part of the seven years elapsed during infancy, the party has three years after his arrival at age to make his entry or claim, and no more. *Pender v. Jones*, 2 Hay., 294, (479.)

4. Tenant in tail aliens and dies: (The issue in tail will be barred, if he be under none of the disabilities mentioned in the act, unless he enter or claim within seven years after his right to defeat the alienee's title descends to him. *Wells v. Newbold*, Conf. Rep., 375, (450.)

5. Neither the act of 1800, repealing the law granting escheated property to the University, nor bringing a suit by the escheator in 1801, suspended the statute as to the trustees of the University, whose right was sought to be divested by those acts. *University v. Campbell*, 1 Murph., 185.

6. Where a husband sold land belonging to his wife, and the vendee remained in possession seven years, and also three years after the death of the wife, her heirs, who were under no disability, were held to be barred. *Jones v. Clayton*, 2 Murph., 62. (Overruled, see *Fagan v. Walker*, 5 Ired., 634.)

7. The death of a tenant before seven years will not stop the running of the statute, provided the possession is continued a sufficient time after his death by his heirs, or others claiming under him. *University v. Blount*, N. C. Term R. 13, (455.)

8. When the statute begins to run, no subsequent disability will stop it. Therefore, where an ancestor brought an ejectment within a year after his title accrued, and continued to prosecute it until it abated by his death, at which period his heirs at law were infants, and they brought another ejectment within three years after their arrival at full age, but more than seven years

after the title of the ancestor accrued, *it was held* that they were barred. *Pearce v. House*, N. C. Term Term R. 305. (722.)

7. Where the right to land devolved on an infant, who died before coming of age, leaving an infant heir who married before arriving at full age, and she brought an action within three years after the death of her husband, *it was held* that she was within the saving of the statute, and, therefore, not barred by it. *Gilliam v. Jacocks*, 4 Hawks, 310.

10. The saving clause of the act of 1715 preserves the right of one of several co-heirs, who is within the proviso, although the other co-heirs, being under no disability, are barred. Hence inejectment on a jointdemise by three co-heirs, of whom two are barred, and the other not, because under disability, the latter may recover, while the action fails as to the other two. *McRee v. Alexander*, 1 Dev. 321.

11. *It seems* that the proviso in the 6th section of the act of 1715 extended only to "actions and suits," and did not include a right of entry or claim to land, and as the action of ejectment depended upon the right of the lessor of the plaintiff to enter, it was not within the proviso. But if it were within the proviso, yet the pendency of a former action, between the same parties for the same premises, would not prevent the operation of the statute as to that part, for which a verdict passed for the defendant. *Morrison v. Connelly*, 2 Dev., 233. (See Rev. Code, ch. 65, sec. 8.)

12. A power over an estate is regarded as the estate itself; and a possession adverse to that estate will, under the statute of limitations, bar the power. *Picket v. Picket*, 3 Dev., 6.

13. In analogy to this rule, if a purchaser at a sheriff's sale neglect to take a deed for seven years, a possession with color of title, adverse to the title conveyed by the sheriff, will bar the purchaser under the execution. *Ibid.*

14. Where A, tenant in fee, mortgaged his land for a term of 500 years, and conveyed his reversion in trust for himself for life, and afterwards for his daughters and died; and, during the continuance of the mortgage term, B got possession of the land and retained it for more than seven years under color of title; and afterwards the daughters, the *cestui que trusts* of the reversion, obtained the possession, and the legal representative of the mortgagee made a release to them of the mortgage term, *it was held* that the daughters, having only an equitable estate in the reversion, the release could not operate as a legal extinguishment of the term, but, at most, could only be an assignment of it; that this term was barred by the statute of limitations, and that, consequently, the daughters could not defend their possession against an ejectment brought by those claiming under B. *Gwyn v. Willborn*, 1 Dev. and Bat., 313.

15. But though a tenant for years may be barred by the stat-

ute of limitations, yet the reversioner will not be affected thereby, until the expiration or extinguishment of the term; therefore if, in the case stated above, the representative of the mortgagee had received satisfaction from the trustee and surrendered the term to him, he, or his *cestui que trusts* holding for him, would have become entitled to the legal possession of the land, and might have defended it against the ejectment. *Ibid.*

16. Although the statute of limitations may have run against and barred one claiming as heir, who was in existence at the time, yet it shall not affect a preferable heir who was not then in existence, for the latter heir does not come in under the first heir, but above him, and is not, therefore, bound by his acts. *Caldwell v. Black*, 5 Ired., 463.

17. A person suing in ejectment, who was under a disability which prevented the statute from running against him, is entitled to recover his share, although there are tenants in common with him, whose right of action is barred by the statute. *Ibid.*

18. An action of ejectment by husband and wife is not barred by the statute of limitations, although the defendant may have been seven years in possession under color of title, the possession having commenced during the disability of the wife. *Ibid.*

19. Where a husband and wife sold land belonging to the wife by a deed purporting to convey a fee simple, she not having acknowledged the conveyance so as to pass her title, and the bargainee took and held possession under such conveyance, *it was held* that neither she, nor her heirs, if she died during the coverture, were barred from asserting her or their title by the statute of limitations, until after the lapse of seven years from the death of her husband, the possession of the bargainee not having become adverse to her, or them, until the death of the husband. *Fagan v. Walker*, 5 Ired., 634.

20. Where, in an action of ejectment, the defendant relied upon the statute of limitations, and the evidence was that the defendant and A, under whom he claimed, had been seven years in actual possession, except for the space of four or five months, an interval that elapsed between the time when a tenant of A left the premises, and the time when the defendant entered under his purchaser, *it was held* that the interval between the two occupations was too long to found a presumption on of a continued possession, in the absence of any intermediate act of ownership by A, or any one under him. *Shaw v. Shepard*, 6 Ired., 361.

21. In cases of adverse possession of land, the statute of limitations begins to run from the ouster. If the one having the right be a *feme covert*, and the seven years have expired in the life time of her husband, she has three years, and only three, after the death of her husband, within which to commence her suit: when the seven years have not expired in the life time of her husband,

the two periods of seven years from the ouster and three years from the death of her husband are concurrent, until one of them shall have run out, and then the *feme* is entitled to the other and longer period to enter or sue. *Crumph v. Thompson*, 9 Ired., 491.

22. The last *proviso* to the 1st section of the statute of limitations, Rev. Stat., ch. 65, sec. 1, extends to cases where the plaintiff has been non-suited, as well as to those in which a verdict has been found against him. *Long v. Orrell*, 13 Ired., 123. (See Rev. Code, ch. 65, sec. 1.)

23. Where there are several demises of divers persons in the first action of ejectment, it is not necessary that a demise from each of those persons should be laid in the declaration in the second action, but it is sufficient for the second declaration to be on the single demise from that one or more of the lessors in the former suit, in whom the title is found to have been; for the count in each of the several demises is, in law, the same as a separate action, and, therefore, the title of each person is saved, who was a several lessor in such action. *Ibid.*

24. By bringing an action of ejectment, a party then having the right of entry shall continue to have it, as long as that action pends, and afterwards, also, if within one year afterwards he will bring another action, and so on from time to time, no matter who may be at the time the tenant in possession. *Ibid.*

25. An attempt to procession land under the act Rev. Stat., ch. 91, is not embraced in the last *proviso* to the 1st section of the statute of limitations, Rev. Stat., ch. 65, so as to prevent actions of ejectment from being barred, if brought within one year after a failure to recover in a preceding section. *Crumph v. Thompson*, 13 Ired., 150. (See Rev. Code, ch. 88 and ch. 65, sec. 1.)

26. Coverture is not a saving against the operation of the statute of limitations as to land, unless the wife *must* be joined with the husband in order to sustain the action; but where he *may sue alone*, or *may join* his wife with him, at his election, the statute bars. *Halford v. Tetherow*, 2 Jones, 393.

27. When an eviction from land takes place during coverture, the husband may sue alone, or may join his wife; and he may, therefore, in such case be barred by the statute. *Ibid.*

28. The *proviso* for a new action within a year after a plaintiff has suffered a nonsuit, as a saving against the statute of limitations, means that there must be some real parties plaintiff and the same cause of action in both, but there need not be the same defendant in the new as in the former action; nor does the fact that the new action contains a second count upon the demise of other persons make any difference. *Williams v. Council*, 4 Jones, 206.

29. The *proviso* in the statute, as a saving to an infant, is a *personal protection*, and the grantee or releasee of the infant has no right to its protection. *Ibid.*

30. Where an estate in land was limited to one for life, with a remainder to a woman who married during the life estate, *it was held* that she was not barred by seven years of adverse possession after the termination of the life estate, when it appeared that she had brought suit within one year after the death of her husband. *McLane v. Moore*, 6 Jones, 520.

31. Where the father of a married woman died seized of a tract of land, *it was held* that according to the laws of this State the daughter became actually seized of the land by descent, which made her husband, who had children by her, tenant by the curtesy *initiate*, and that he might be barred by an adverse possession of seven years under color of title. *Childers v. Bungarner*, 8 Jones, 297.

32. The children of a person, entitled to an estate as tenant by the curtesy, are allowed seven years after the death of their father before they are barred by the statute of limitations. *Ibid.*

See (Ejectment—Of the title necessary to support the action.) (Estoppel—By Deed, 38.) (Grant—How and when grants may be avoided, 13–21.) (Limitations—When the statute begins to run, 3–9–13–28.) (Possession, 22, 23, 29.) (Power, 4.) (Widow—Of her dower, 12.)

LITERARY BOARD.

1. The President and Directors of the Literary Board have no right to allow, and are not bound to pay, their secretary a *per diem* compensation, for a greater number of days than they are actually in session. *Battle v. Literary Board*, 6 Fred., 203.

2. When the Board passed a resolution, that their secretary should be allowed so much *per diem* while he was employed, the construction is, that he was allowed the *per diem* pay only while the Board itself was in session. *Ibid.*

LUNATICS.

See (Idiots and Lunatics.)

MAD DOGS.

1. In an action under the act, Rev. Stat., ch. 70, giving a penalty of \$50 against the owner of a dog, if he have good reason to believe that he was bitten by a mad dog, and neglect or refuse to kill him immediately, it is not necessary to prove that the biting dog was in fact mad; it being sufficient, if the owner of the dog bitten had good reason to believe that the other dog was mad. *Wallace v. Douglass*, 10 Ired., 79. (See Rev. Code, ch. 67.)

MAIMING.

1. On an indictment for maiming under the act of 1791. (see Rev. Code, ch. 34, sec. 14,) the malicious intent to maim or disfigure may either be express or implied from circumstances; and it is not necessary to prove antecedent grudges, threatenings or an express design. *State v. Irwin*, 1 Hay., 112, (130.)

2. Where an outrageous act, as a maim, is proved, the law presumes that it was done with that disposition of mind which the law requires to constitute guilt, until the contrary is shown. *State v. Evans*, 1 Hay., 281, (325.)

3. In an indictment under the 48th section of the 34th chapter of the Revised Statutes, an intent to disfigure is *prima facie* to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute. *State v. Girkin*, 1 Ired., 121. (See Rev. Code, ch. 34, sec. 47.)

4. It is not necessary, in an indictment under this statute, to prove malice aforethought, or a preconceived intention to commit the maim. *Ibid.*

5. To constitute a maim by biting off an ear, it is not necessary that the whole ear shall be bitten off; it is sufficient if a part only is taken off, provided it be enough to alter and impair the natural personal appearance, and, to ordinary observation, to render the person less comely. *Ibid.*

6. In an indictment under the statute for maiming by biting off an ear, it is not necessary to state whether it was the right or left ear. *State v. Green*, 7 Ired., 39.

See (Indictment—In what cases an indictment will lie, 28.) (Indictment—Form and matters relating thereto, 77.) (Indictment—Of the trial, verdict and judgment, 8-9.)

MAINTENANCE AND CHAMPERTY.

1. Where one purchased land, promising by a written instrument to pay therefor fifty dollars, if the seller would take that sum before there should be a decision as to the title of the land, but agreeing to pay one hundred dollars if the seller would wait until he could get a decision that the title was good, *it was held* that the contract was not tainted with maintenance. *Nichols v. Bunting*, 3 Hawks, 86.

See (Bonds—Of the consideration, 11.)

MALICIOUS MISCHIEF.

1. An indictment for malicious mischief will not lie where the defendant took another's mare from his corn field, in which she was damaging his growing corn, to a secret part of the county where he inflicted the wound, to prevent a repetition of the damage; for malicious mischief is confined to those cases where the act is done in a spirit of wanton malignity, and does not extend to those where the act is prompted by the sudden resentment of an injury, which is calculated to excite passion. *State v. Landreth*, 2 Car. L. R., 246. (223.)

2. An indictment will be sustained at common law for "unlawfully, wickedly, maliciously and mischievously" setting fire to, burning and consuming one hundred barrels of tar, belonging to the prosecutor. *State v. Simpson*, 2 Hawks, 460.

3. An indictment for malicious mischief may conclude at common law, and in such indictment it is not necessary to charge malice against the owner of the property injured. *State v. Scott*, 2 Dev. and Bat., 35.

4. Malicious mischief consists in the wilful destruction of personal property, from actual ill-will, or resentment, towards its owner or possessor. *State v. Robinson*, 3 Dev. and Bat., 130.

5. An indictment for malicious mischief will only lie for the malicious destruction of personal property. Growing corn, except in a few cases, is regarded as a part of the realty; therefore an indictment, for "unlawfully, wickedly and maliciously" cutting and destroying a quantity of standing Indian corn, cannot be supported. *State v. Helms*, 5 Ired., 364.

6. An indictment for malicious mischief must either expressly charge malice against the owner, or fully otherwise describe the offence. Setting forth in the indictment that the act was done "feloniously, wilfully and maliciously," without averring that it was done "mischievously," or with malice against the owner, is not sufficient. *State v. Jackson*, 12 Ired., 329.

7. A man has a property in a dog, so that an indictment for malicious mischief in killing one will lie. *State v. Latham*, 13 Ired., 33.

8. To support an indictment for malicious mischief in killing a dog, it must be shown that the killing was from malice against the owner; it not being sufficient that it was the result of passion excited against the animal, by an injury he had done to the defendant's property. *Ibid.*

MALICIOUS PROSECUTION.

See (Action on the case—Malicious prosecution.) (Evidence—In cases of malicious prosecution and slander.)

MANDAMUS AND QUO WARRANTO.

1. Under the act in the Revised Statutes "concerning writs of *quo warranto* and *mandamus*," the defendant, though judgment is given for him, cannot recover his costs against the relator, where the public only is interested; for the act, though general in its terms, must be confined to those cases only where the relator claims some office or franchise, and has therefore a personal interest in the suit. *State v. King*, 1 Ired., 22. (See Rev. Code, ch. 95, secs. 2 and 5.)

2. An adjudication of the county court, that a particular person has been duly elected sheriff of the county, and that he has the necessary freehold qualification, is not a judgment *in rem*, binding upon all the world, but can at most conclude the parties contesting the election, and cannot, therefore, operate as an estoppel to an information in the nature of a *quo warranto*, filed by the proper officer of the State against the sheriff, alleging the want of such freehold qualification. *State v. Hardie*, 1 Ired., 42.

3. An information in the nature of a *quo warranto* brought to try the right to an office or franchise, though in form a criminal proceeding, is in the nature of a civil remedy, and is not therefore within the meaning of the 8th section of the bill of rights, which declares that "no freeman shall be put to answer any criminal charge but by indictment, presentment or impeachment." *Ibid.*

4. The act in the Revised Statutes, "concerning writs of *quo warranto* and *mandamus*," is not confined to contests between different claimants to offices and franchises; but is intended to regulate the mode by which all usurpations of offices and franchises may be examined and determined in courts of justice. Hence, an information in the nature of a *quo warranto* may, with leave of the court, be filed by the attorney general, or solicitors for the State, in their respective circuits, against a sheriff, to enquire by what right he holds his office, and whether any person should be named relator or not in such information, seems to be immaterial, as the information is that of the attorney general or solicitor of the State, and not of the relator. *Ibid.* (See Rev. Code, ch. 95.)

5. Whether its appearing affirmatively that an information was filed with the leave of the court be necessary or not, it will be sufficient if the proceedings of record show that it has the sanction of the court. *Ibid.*

6. It is no objection to an information that the full title of the "solicitor for the State" is not given, and that the term "solicitor" only is used. But if it were an objection, it would be formal only, and could not avail the defendant on a demurrer to his plea. *Ibid.*

7. The 63d section of the 31st chapter of the Revised Statutes, which prescribes the time when writs and other civil process shall issue and be made returnable, is inapplicable to, and was not intended to have any operation upon, the prerogative writ of *mandamus*. Such a writ can only issue when a necessity for it is shown; and from its very nature it should issue, be made returnable and be returned, according as the necessity that calls for it may require. *State v. Jones*, 1 Fred., 129. (See Rev. Code, ch. 31, sec. 50.)

8. No general rules of practice in relation to the issuing and return of writs of *mandamus* have yet been prescribed in this State, and it is, therefore, in each case the province of the court, by which the writ may be awarded, to fix the day on which it should be made returnable. *Ibid.*

9. The case set forth in the writ of *mandamus* must show that there is no other specific legal remedy; because the court will not, ordinarily at least, interfere by *mandamus* where there is another specific legal remedy. But it is not proper, much less necessary, that the writ should declare that there is no other remedy for the mischief which it commands to be removed. *Ibid.*

10. The writ of *mandamus* should be directed to all the persons, whose duty it is to perform the act required, though some of them may be applicants for the writ. And where three of seven commissioners filed a petition for a *mandamus* to compel the other four in concurrence with them to perform a specific duty, and an alternative *mandamus* was issued, directed to the

four only, which was returned with an admission of service by the three petitioners, and an expression of their readiness to perform the duty, whereupon a peremptory *mandamus* was ordered, *it was held* that the order for the peremptory *mandamus* was against all, and that the proceedings were sufficient. *Ibid.*

11. When an alternative *mandamus* is issued, and no answer, or return of the cause is made, the court may be moved for an attachment against the persons to whom it has been directed; and in such a motion the attachment ought to be refused, unless there has been a personal service of the writ, or such a service as the court, by special order under the circumstances of the case, may direct. But the court, instead of proceeding by attachment for contempt because cause is not shown, may direct a peremptory *mandamus* to issue, simply regarding the alternative *mandamus* as in the nature of a rule to show cause why an absolute *mandamus* should not issue; and to justify this course, personal service of the rule, or the writ in nature of a rule, is not necessary; but service by leaving a copy at the dwelling house is sufficient, if the court deem it reasonable; and of this the court which issues the rule, or writ in nature of a rule, is the exclusive judge, and its judgment upon that matter cannot be revised upon appeal. *Ibid.*

12. Though a peremptory *mandamus* implies that the party has been fully heard, and, therefore, that he can allege no reason for not obeying it, yet an exception is of necessity implied, that such obedience is not forbidden by a new law passed after the writ was awarded. *State v. Jones*, 1 Ired., 414.

13. A writ of *mandamus* will not be granted to a relator for his relief, except where he has a *specific legal* right, and has no other specific remedy adequate to enforce it. *State v. Justices of Moore County*, 2 Ired., 430.

14. The justices of the county court, having a discretion to a certain extent in granting licenses to retail, a *mandamus* will not lie to compel them to grant a license to any particular person, though he may have been improperly refused a license. *Attorney General v. Justices of Guilford*, 5 Ired., 315.

15. But if justices, fully informed that they have discretion to regulate a branch of the public police (as in the case of granting licenses to retailers), perversely abuse their discretion, by obstinately resolving not to exercise it at all, or by exercising it in a way purposely to defeat the legislative intention, or to oppress an individual: such an intentional, and therefore corrupt, violation of duty and law must be answered for on an indictment. *Ibid.*

16. An information filed by the attorney general for the purpose of having the charter of an incorporation declared to be forfeited, though it need not be expressed in technical language, must set out the substance of a good cause of forfeiture in

its essential circumstances of time, place and overt acts. *Attorney General v. Petersburg and Roanoke Railroad Company*, 6 Ired., 456.

17. When the legislature required "the grounds" to be set forth, on which the forfeiture is alleged to be incurred, nothing less could be meant than that the information, like an indictment or declaration, should state with certainty to a common intent those facts and circumstances, which constitute the offence in its substance, whether of misfeasance or nonfeasance: so that, on its face, if true, it may be seen that there is a specific ground in fact, and not by conjectural inference, on which a forfeiture ought to be adjudged. *Ibid.*

18. When a charter expressly imposes a duty, which the corporation is to perform, not merely to the citizen, but towards the sovereign itself, although it may not declare that non-performance shall work a forfeiture, yet it must be taken to have been required by the State as a material stipulation, for the non-performance of which by the corporation the State may put an end to the charter. But if the sovereign (which with us is the legislature) with the distinct knowledge of a breach of duty by the corporation, a knowledge declared by the legislature, or so clearly to be inferred from its own archives that the contrary cannot be true, thinks proper by an act to remit the penalty, or to continue the corporate existence, or to deal with the corporation as lawfully and rightfully existing, notwithstanding such known default, such conduct must be taken, as in other cases of breaches of condition, to be intended as a declaration, that the forfeiture is not insisted on, and, therefore, as a waiver of previous defaults. *Ibid.*

19. Where, by act of assembly, certain persons were appointed commissioners "to select and determine upon a site for a permanent seat of justice for S. county, who shall locate the same as near the centre of the said county as a suitable location can be obtained, taking into consideration, both the extent of the territory and population," and the commissioners made selection, upon an application for a prohibition and *mandamus* on the general ground that the site was not in the centre of the county, *it was held* that though, had the commissioners neglected to discharge the duty at all, the court might by *mandamus* have enforced its performance, yet, as the commissioners had acted and exercised their judgment in the selection, and the trust evidently requiring and the act conferring a discretion, the court could not interfere by *mandamus* to control the exercise of that discretion. *State v. Bonner*, Busb., 257.

20. On a petition for a *mandamus*, the writ of alternative *mandamus* is always the first *process*, as distinguished from a *rule*. *State v. Justices of Anson*, Busb., 302.

21. The return of the defendants to an *alternative mandamus*

will be taken as true, unless its falsity is alleged and shown by the petitioner. *Tucker v. Justices of Iredell*, 1 Jones, 451.

22. Where the return of the defendants admits a material allegation of the petitioner, but avers new matter in avoidance, the issue, to avail the petitioner in falsifying the return, should be taken on the new matter, and not on the admitted fact; for as to that, the issue will be treated as immaterial. *Ibid.*

23. Where a *mandamus* is prayed for to compel the justices of a county to pay for the building of a bridge, and a verdict is rendered by a jury, upon an issue submitted to them, that the bridge was not built according to the contract, the petitioner has no right to recover, in this proceeding, the value of the bridge, during the time it had been used by the public. *Ibid.*

24. A contractor to build a court house, who has not done the work according to the contract, is not entitled to a *mandamus* to compel the justices of the county employing him, to pay the sum agreed on; especially after they had already paid him more than his work and materials were worth. *Dameron v. Justices of Cleveland*, 1 Jones, 484.

25. The defense to an information in the nature of a *quo warranto* ought to be made by way of a plea, and not that of an answer. *Burton v. Patton*, 2 Jones 124.

26. An information in the nature of a *quo warranto* may be filed against public officers after the expiration of their office, when their conviction may be necessary to invalidate their acts, which are of public concern. Therefore, *it was held* that such a proceeding against commissioners, appointed by an act of assembly to purchase a town site and to lay off and sell lots, is not too late after they have professed to act, and have professed to perform every particular duty prescribed by the act. *Ibid.*

27. Persons, who have been regarded as public officers for a greater part of the time during which the office existed, and whose acts are recognized by other public functionaries, must be taken to be officers *de facto*, and their acts will be regarded as valid, unless declared otherwise by some competent tribunal in a proceeding *directly* against them. *Ibid.*

28. When a *mandamus* issues to the justices of a county, commanding them to do a thing in their public capacity, their return to it must be made by them as a body. *McCoy v. Justices of Harnett*, 4 Jones, 180.

29. Where an alternative *mandamus* was directed to the justices of a county, and a part of them made a return of one import, and another part made a return of a different import, no meeting of the whole body having been held to ascertain the voice of the majority, *it was held* that there was no legal return, and that all the proceedings in the case, predicated on a return, were erroneous. *Ibid.*

30. A petition for a *mandamus*, alleging a contract between

the petitioner and the justices of a county, by which he was to be paid a certain sum for building a court house, and a certain other sum for building a jail, "in monthly instalments for lumber and work," and praying for a writ of *mandamus* to compel the payment of what is due," without averring that any particular sum is due, is defective. And so is a writ of alternative *mandamus*, commanding the defendants to provide the means, and pay "whatever sum is now due," without an allegation that any particular sum is due. *McCoy v. Justices of Harnett*, 5 Jones, 265.

31. Where it appears from a contract for erecting a public building, sought to be enforced by a *mandamus*, that the work was to be done under the direction of a superintendent, who was to make monthly estimates of work done and materials furnished, and to certify the same, and that the contractor was to be paid monthly on the production of such certificates, a petition for a *mandamus*, and a writ of *mandamus* commanding payment to be made, without averring the existence of such certificates, or accounting for their non-production, is defective. *Ibid.*

32. Where a petition for a *mandamus*, and the writ issued in pursuance thereof, are defective in substance, they will be quashed on motion, at the cost of the petitioners. *Ibid.*

33. Where to a writ of alternative *mandamus* the defendant exhibited a bill in equity, alleging an equitable defence to the demands of the plaintiff, and praying for an injunction to restrain him from prosecuting the writ, and asked that the bill might be received as "a return" to the writ, *it was held* that it was proper in the court to refuse the injunction, and to order the defendant to make a return to the writ of *mandamus*. *Neuse River Navigation Company v. Commissioners of Newbern*, 6 Jones, 204.

34. The proper order in a *mandamus*, seeking payment from the justices of the county court for work done for the county, under a contract which they were empowered to make, and which was made by commissioners appointed by them, is *that they pay*, and not that they be required to lay taxes, &c. *McCoy v. Justices of Harnett*, 6 Jones, 488.

35. Where one of the stipulations of a contract for making a public building was, that the work was to be done under the direction of a superintendent, and payments were to be made monthly on the production of his estimates and certificates; *it was held* unnecessary, after the work was completed, approved and accepted, to do more than set forth in a petition for a *mandamus*, that the work had been done under such superintendent, and his estimates, &c., had been presented, but were disregarded by the justices appointing him, and payment refused on other grounds. *Ibid.*

36. The superior court of any county may issue a writ of *mandamus* to the Governor of the State, commanding him to do an act which is merely ministerial. *Cotton v. Ellis*, 7 Jones, 545

37. Where an act of assembly establishing a new county appointed certain persons as commissioners to ascertain a site and purchase a tract of land for the county seat, and required the justices of the county thereupon to appoint commissioners to lay off lots in the town and sell them, *it was held* not to be a sufficient return to an alternative *mandamus* to the justices, for them to allege that the locating commissioners had been prompted by improper motives in the discharge of their duties. *Lander v. Justices of Ashe*, 8 Jones, 174.

38. Where the locating commissioners, under the act above referred to, were directed to purchase a tract of land, take a deed for it and file it in the office of the clerk of the county court, whereupon the justices of the county were to do certain acts, *it was held* that the justices were not entitled to any other notice than the locating commissioners had acted, than the filing of such deed, especially, as the act did not expressly direct that any notice should be given them. *Ibid.*

39. The proper way for the justices of a county to make a return to a *mandamus* is for them to convene, and, a majority being present, to agree upon the facts they mean to rely upon by way of defence, and then appoint some one of their body to make affidavit, and to do all the other things required by the proceeding. *Ibid.*

40. A contract for erecting a public building, made with a committee appointed by the justices of a county, if performed according to its terms by the contractor, will bind the justices, and they may be compelled, by a peremptory *mandamus*, to pay the stipulated price, although early in the progress of the work they had dismissed the committee, and endeavored to rescind the order appointing it, and had given notice to the contractor not to proceed. *McCoy v. Justices of Harnett*, 8 Jones, 272.

41. Where a person contracting to erect a public building, after the dismissal of the committee through whom the contract was made, and a rescission of the order appointing it, and a notice by the justices not to go on with the building, still continued to act under such committee, and by its directions made material departures from the specifications in the contract, *it was held* that, though he completed the building within the specified time, he was not entitled to a peremptory *mandamus* to compel the payment of the price. *Ibid.*

42. An information in the nature of a writ of *quo warranto* against a corporation for the purpose of having its privileges declared forfeited, because of neglect and abuse in the exercise of them, must be filed in the name of the attorney general of the

State, and cannot be instituted in the name of one of the solicitors. *Houston v. Neuse River Navigation Company*, 8 Jones, 476.

See (Clerks and Clerks and Masters—Of their election or appointment, 3–4.) Corporations—Of corporations generally, 1.) (Costs—When neither party recovers costs, 7–11.) (Costs—In civil proceedings, when the plaintiff pays costs, 11.) (Forcible Entry and Detainer, 16.)

MANSLAUGHTER.

See (Homicide.)

MARRIAGE.

See (Assumpsit—Defence to the action.) (Husband and Wife—Marriage.) (Indictment—When an indictment will lie, 59.)

MASTER AND SERVANT.

1. A master is not liable for an actual trespass, which his servant may commit without his previous command or subsequent assent; but he is liable in an action on the case for the tortious acts, negligence or unskilfulness of a servant, acting in the prosecution of his service, or in the exercise of the authority he has given him, though not under his immediate direction. *Harris v. Mabry*, 1 Ired., 240.

2. Where the case was for wrongfully and negligently permitting the plaintiff's slave to pass in the defendant's stage coach, without the permission of the plaintiff, whereby the slave escaped and was lost for some time to the plaintiff, and she was put to great expense, &c., and where the evidence was that the defendant's drivers and stage agents were guilty of gross negligence in taking the slave beyond a certain town, where her pretended pass was at an end, and permitting her to travel in defendant's stages to another state, whereby the slave was lost to the plaintiff, *it*

was held that the defendant was liable for the injury, and that the plaintiff was entitled to recover all such damages as were the consequence of the acts of the defendant's servants, while in his service. *Ibid.*

3. The owner of a slave, who is hired out, is not answerable to a physician for medicine or medical services, rendered to the slave at the request of the hirer, and without the request or knowledge of the owner. *Haywood v. Long*, 5 Ired., 438.

4. What may be the right or liabilities, in such a case, as between the owner and the hirer, *quaere*. *Ibid.*

5. The hirer of a slave, and not the general owner, is liable in an action for medicine and medical services rendered the slave while the term of hiring continued, the services and medicine not being rendered at the request of the owner, but at the request of the hirer; and a particular custom in a county, that the general owner shall pay these expenses, does not vary the law. *Jones v. Allen*, 5 Ired., 473.

6. A master is not liable for the willful trespass of his servant. *Wesson v. Seaboard and Roanoke Railroad Company*, 4 Jones, 379.

7. A master is not liable in damages to one servant for injuries caused by the negligence of a fellow-servant, engaged in the same employment, provided the master has taken reasonable care to associate with the person injured, servants of ordinary skill and care; and if the person injured be a slave, his owner can stand in no better situation than a free servant. *Ponton v. Wilmington and Weldon Railroad Company*, 6 Jones, 245.

See (Slaves—Of a master's liability for the contracts, or acts, of his slaves.)

MERGER.

1. Estates do not merge when they are not *ejusdem generis*; therefore, where a father had a life estate in a slave, remainder to all his daughters, a gift by him of the slave to the husband of one of the daughters will not merge the life estate in the remainder, because that remainder is in all the daughters. *Moye v. —*, 2 Hay., 186, (387.)

MILITIA.

1. Where a man, who is liable to militia duty, is arrested on a civil process while attending a militia muster, in violation

of the act of assembly, he may plead the same in abatement. *Murphy v. McCombs*, 11 Ired., 274.

2. The only effect of the act of 1858, ch. 22, repealing so much of sec. 9, ch. 70 of the Rev. Code, as relates to the appointment and salary of the adjutant general, is to take from the governor the power to fill future vacancies in that office, and to revest it in the legislature, and also to leave the salary to be paid semi-annually, as provided by the Rev. Code, ch. 102, sec. 2. *Cotton v. Ellis*, 7 Jones, 545.

MILLS.

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| <p>I. Action at common law for damages caused by a mill.</p> <p>II. Proceedings for damages by petition under the act of 1809.</p> <p>III. Proceedings to condemn land for the erection of a mill.</p> | <p>IV. Liability of mill owners for bridges attached to their dams.</p> <p>V. Indictment against mill owners for keeping false toll dishes.</p> |
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I. ACTION AT COMMON LAW FOR DAMAGES CAUSED BY A MILL.

1. Case for nuisance in erecting a mill will lie for every fresh continuance of the dam and pond after action brought; though heavy damages are not usual in the first action, they may be increased in a second, to compel an abatement of the nuisance. — *v. Deberry*, 1 Hay., 248, (287.) S. P., *Caruthers v. Tilman*, *Ibid*, 501, (576.) (For the statutory remedy by petition. See Rev. Code, ch. 71.)

2. A license to overflow a man's land by a mill pond is not good if verbally given, because land cannot be charged by any matter of less solemnity than a deed. *Ibid*.

3. Where a second action is brought for overflowing plaintiff's land by a mill, the damages should be assessed for the time between the beginning of the first and the second action; and as the action may be repeated for every continuance of the nuisance, the damages should be light. *Bradley v. Amis*, 2 Hay., 399, (601.)

4. In action for overflowing the plaintiff's land, he need not prove his title, though it be set forth in the declaration, for possession alone is sufficient to support this action against a wrongdoer. *Yeargain v. Johnston*, Tay., 80, (56.)

II. PROCEEDINGS FOR DAMAGES BY PETITION UNDER THE ACT OF 1809.

1. Upon an appeal from the county court in the case of a petition for overflowing land by the erection of a mill, the jury in the superior court must meet on the premises. *Andrews v. Johnson*, 1 Car. L. R., 272, (26.) (Altered; see Rev. Code, ch. 71, sec. 16.)

2. Whenever any person has sustained an injury to his land by the erection of a mill by another, it is necessary for him first to file a petition in the county court, according to the act of 1809. *Mumford v. Terry*, 2 Car. L. R., 425, (308.) (See Rev. Code, ch. 71, sec. 8 and following.)

3. In a petition under the act of 1809 to recover damages for the overflowing of the plaintiff's land, if the defendant die it cannot be revived by a *sci. fa.* against the heirs, they not being liable for the tort of their ancestor. *Fellow v. Fulgham*, 3 Murph., 254. (*Quere* how this is affected by ch. 1, sec. 1, of the Rev. Code, as to abatement of suits, &c.)

4. Though the statute has given a new remedy by petition for injuries from the overflowing of mill ponds, yet the nature of the injury is still the same. It is a *tort* in which all, or any one or more, are liable for the whole injury, and it, therefore, survives against the survivors. *Wilson v. Myers*, 4 Hawks, 73.

5. A conveyance made to defeat, hinder or delay a party injured by the erection of a mill, in the recovery of his damages, is fraudulent and void as to such party, and the owner or proprietor of the mill, notwithstanding such conveyance, continues still liable for the damages. *Purcell v. McCallum*, 1 Dev. and Bat., 221.

6. Upon a petition filed under the act of 1809, to recover damages caused by the erection of a mill, damages may be assessed for an injury to the health of the plaintiff and his family, as well as for overflowing his land. *Gillet v. Jones*, 1 Dev. and Bat., 339.

7. The main object of the act of 1809 was to restrain a malicious exercise of the common law right to sue for a nuisance, in frivolous cases. It does not create any new right to damages, nor abolish any pre-existing one. It only restricts the party, to a certain extent, to a particular mode of recovery. Its policy requires its application to all injuries, of whatever character, arising from the erection of a mill. *Ibid.*

8. Upon a verdict under the act of 1809, where the annual damage is under twenty dollars, the proper judgment is for the whole damages, with a *cessat executio* for those which are not payable; and this judgment should be peremptory, and not conditional. *Ibid.*

9. If the damages be increased, the plaintiff will not be estopped by the judgment. And if the defendant do not keep

up the mill, the judgment may be set aside for the residue of the damages by an *audita querela*, or other remedy of a like nature. *Ibid.*

10. Where the suit upon the petition ends within five years, and the plaintiff has a verdict for more than twenty dollars annual damages, he may elect to take judgment for five years damages, or only for the years passed. And if he elect to take a judgment for five years annual damages, he will be concluded for that period, and not be at liberty to use his common law remedy. *Ibid.*

11. It would be error as against the plaintiff, and perhaps also as against the defendant, to enter a judgment for the five years annual damages, where it exceeds twenty dollars, without the election of the plaintiff, appearing upon the record, unless the suit has been protracted beyond the five years. *Ibid.*

12. If, at the time of the trial of the petition for damages, five years have elapsed since the filing of the petition, a peremptory judgment for the five years is proper, whether such annual damage be above or below twenty dollars. *Ibid.*

13. One, whose land is overflowed by a mill pond, has a right to recover for the damages done him, notwithstanding his ancestor consented by parol, to the erection of the dam; for if it were the grant of an incorporeal hereditament, it was void for want of a deed; if a mere authority or license, it could be revoked, and ceased with the life of the grantor. *Bridges v. Purcell*, 1 Dev. and Bat., 492.

14. Where the erection of a mill on a stream causes the water to overflow the land or mill of a proprietor above only when the stream is swollen, that will not excuse the party from damages altogether, but will only diminish the amount of them. *Pugh v. Wheeler*, 2 Dev. and Bat., 50.

15. If, on a petition for damages under the act of 1809, the jury return a verdict assessing damages for more than one year before the filing of the petition, the court may correct it by giving a judgment for the damages of only one year previous. *Ibid.*

16. In assessing damages under the act, the jury are not bound to give the damages at an average for the five years, but may assess different sums for different periods during that time. *Ibid.*

17. Where a petition under the act alleged "that by the erection of the mill, 30 or 40 acres of his land were overflowed, and that by the said overflowing, the healthfulness of his plantation, on which he resides, is greatly deteriorated, the overflowing extending to within 300 yards of his dwelling house," the plaintiff is only entitled to recover damages for the injury done by inundating his own lands, not for an injury to the health of his family by other parts of the mill pond. The plaintiff being bound

to state in his petition *in what respect* he was injured, and his proofs cannot go beyond his allegations. *Bridgers v. Purcell*, 1 Ired., 232.

18. On an appeal from the judgment on the verdict of a jury in the county court, assessing damages for the erection of a mill, the superior court has a right to permit the sheriff to amend his return of the verdict of the jury, so as to set forth that they were sworn on the premises. *Harper v. Miller*, 4 Ired., 34.

19. In the case of a petition for damages caused by the erection of a mill, under the act, when there has been a verdict and judgment in the county court, the superior court has no right to dismiss the appeal of either party therefrom, because of irregularity in the proceedings previous to the verdict, or in the verdict itself; but the trial must be had in the superior court, as prescribed in the act. *Ibid.* (See Rev. Code, ch. 71, sec. 16.)

20. None but a person whose *land* is overflowed or injured by a mill pond, can have the remedy to recover damages by petition, for the injury sustained by the erection of the mill, as provided in the statute concerning mills. *Waddy v. Johnson*, 5 Ired., 333.

21. When the land is so overflowed or injured, the owner may recover *full* compensation for all the injury he has sustained thereby, whether it be more or less direct, whether it affect his dominion in the land by taking away its use, or impair the value of that dominion by rendering the land unfit, or less fit, for a place of residence, or whether the injury, reaching beyond its immediate mischief, extends also to the person, or the personal property of the petitioner. *Ibid.*

22. One who complains of a nuisance to his land by the erection of a mill dam, is not obliged to wait until the expiration of a year before he files his petition to recover damages under the act, and when it is filed within a year, the damages are necessarily confined to the time the injury has existed. *Cockran v. Wood*, 6 Ired., 194.

23. An executor has a right to a remedy by petition, under the act, to recover damages for the overflowing by a mill pond of his testator's land in the life time of such testator. *Howcott v. Warren*, 7 Ired., 20.

24. A remedy by petition under the act to recover damages for overflowing land by a mill pond, may be had against the executors of the person who committed the injury. *Howcott v. Coffield*, 7 Ired., 24.

25. Notwithstanding the act of 1844, ch. 13, relating to jury trials in the counties of Henderson, &c., a person cannot maintain an action on the case for the overflowing of his land by the erection of a dam for a public grist mill in the county of Henderson, without having first proceeded by petition, either in the county or superior court of Henderson, according to the provis-

ions of the act of 1809. *King v. Shuford*, 10 Ired., 100. S. P. *Pace v. Freeman*, 10 Ired., 103.

26. Possession alone will maintain an action on the case at common law for overflowing one's land, and therefore, is sufficient to support a petition under the act in relation to mills. *Pace v. Freeman*, 10 Ired., 103.

27. The owner of land injured by the erection of a mill, who has proceeded by petition, under which the annual damage assessed was as high as twenty dollars, and who has taken judgment for and received the damage for the whole five years, cannot maintain an action on the case, brought after the expiration of the five years, without having again ascertained the annual damage by proceeding under a second petition. *Gilliam v. Canaday*, 11 Ired., 106.

28. In a proceeding under the act, to recover damages for overflowing land by a mill pond, it is not necessary that a copy of the petition should be served on the defendant. It is sufficient for the plaintiff to give the defendant ten days notice in writing, of his intention to file the petition. *Cox v. Buis*, 12 Ired., 139.

29. In a proceeding to recover damages for ponding water by a mill dam, under the act, the verdict of the jury and the judgment of the court thereon are conclusive as to the assessment of damages, up to the time when such judgment was rendered. *Beatty v. Conner*, 12 Ired., 341.

30. An application for relief from damages, assessed for a period subsequent to the time of the judgment, can only be heard when the dam is taken away or lowered. The washing out of the channel, and other causes of a similar kind, furnish no reason for abating the damages. *Ibid*.

31. A dam erected below a steam mill, not for the purpose of driving the machinery of the mill, but for the purpose of floating timber to the mill, by which water is ponded back upon the land of another, does not come within the meaning of the act of 1809, and an action on the case will lie at once for the injury. *Bryan v. Burnett*, 2 Jones, 305.

32. It is not necessary that the water of a mill-pond should actually overflow the land of a person, to entitle him to recover damages under the act. If the dam throws back the water so as to *injure* the land by preventing it from being drained, the owner will be entitled to damages. *Johnston v. Roane*, 3 Jones, 523.

33. Upon an enquiry as to the damages arising from the ponding of water upon land, the petitioner has a right to have the question submitted to the jury, whether the overflowing complained of was, during the time alleged, injurious; and any former benefits the land may have received from such overflowing, has nothing to do with the question. *Kimel v. Kimel*, 4 Jones, 121.

34. If water be ponded back upon the land of another by the erection of a mill-dam, he is entitled, in the remedy by petition, to recover, at least, nominal damages, whether there be any substantial injury or not. *Wright v. Stowe*, 4 Jones, 516.

35. In a petition for damages caused by the erection of a mill dam, where in the county court the plaintiff's right to relief is denied by plea or answer, the proper course is to empanel a jury to try the truth of the allegations made in bar of such right, and if it be found in favor of the plaintiff, a jury must then be ordered to go on the premises to assess the damages, but in all cases where there is an appeal to the superior court, the facts are to be ascertained by a jury at bar, but in that court the allegations in bar of relief must be submitted to be first passed upon by the jury, before they proceed to ascertain the amount of damages. *Jones v. Clarke*, 7 Jones, 418.

36. In a petition for damages caused by the erection of a mill dam, the fact that the plaintiff and those under whom he claimed had made no complaint for twelve years, is neither a bar to the action, nor cause for the mitigation of damages. *Griffin v. Foster*, 8 Jones, 337.

See (Evidence—Proceedings in other suits, when and how far evidence, 37.)

III. PROCEEDINGS TO CONDEMN LAND FOR THE ERECTION OF A MILL.

1. In condemning an acre of land for the purpose of erecting a mill, the court is forbidden to confirm a report of commissioners if it take away "houses," &c; and by necessary implication, the commissioners are forbidden to include them in their survey. They are, therefore, not authorized to include in their valuation any houses found on the condemned acre, even though erected there by the petitioner before the proceedings were commenced. The valuation must be confined to the naked land. *Burgess v. Clark*, 13 Ired., 109. (See Rev. Code, ch. 71, sec. 2.)

See (Costs—In civil proceedings, when plaintiff pays costs, 6.)

IV. LIABILITY OF MILL OWNERS FOR BRIDGES ATTACHED TO THEIR DAMS.

1. The penalty imposed by the act, Rev. Stat., ch. 104, sec. 25, on the owner of a water mill, for not keeping a bridge in repair, only applies to such bridges as constitute a part of the public road which runs over the dam itself, but not to a bridge which is erected over a mill race on a road that crosses such race near the mill, but does not run over the dam. *Hall v. Morrow*, 2 Jones, 465. (See Rev. Code, ch. 101, sec. 24 and 25.)

V. INDICTMENT AGAINST MILL OWNERS FOR KEEPING FALSE TOLL DISHES.

1. In an indictment under the Rev. Code, ch. 71, sec. 6 and 7 against a mill owner, wherein it was charged that he "did keep in his mill a false toll dish, for the purpose of exacting more toll than by law he of right ought to do," and that "by means of said false toll dish he exacted unlawful toll," against the statute, &c., *it was held* that the allegations were sufficiently supported by proving that the mill owner kept a measure containing one seventh, and another one sixth of a half bushel, with which he openly took toll of all customers, that the word "false toll dish," as used in the statute, meant a toll dish measuring more than one eighth of a half bushel. *State v. Perry*, 5 Jones, 252.

2. In an indictment under the act for keeping a false toll dish, it is unnecessary to aver the capacity of the toll dish charged to be a false one. *Ibid.*

3. In such an indictment, *it was also held* that it ought to be averred in the bill that the mill was one used for the grinding of wheat and corn, but that when it was charged that it was a mill where a false toll dish was used to exact more toll than was lawful, contrary to the statute, it did appear, with sufficient certainty, that it was a mill for grinding corn and wheat. *Ibid.*

4. An indictment under the act cannot be sustained by proof that the mill owner took one sixth part of each half bushel of corn with a half gallon toll dish—because that by dry measure is the measure required by the act. *State v. Nixon*, 5 Jones, 257.

MISMARKING CATTLE, HOGS, &C.

See (Indictment—When an indictment will lie, 45-46-136.)
(Cattle and other Live Stock, 3.)

MONEY.

1. Whoever has the possession of money is presumed to be the owner of it. *Quinton v. Courtney*, 1 Hay., 40, (51,) S. P. *Clary v. Allison*, *Ibid*, 111, (128.

2. For money purposes, bank notes are to be considered as many; as for instance in an action for money had and received

where the plaintiff had received counterfeit bank notes in exchange for a good one, and which he may, therefore, treat as a nullity. *Anderson v. Hawkins*, 3 Hawks, 568.

See (Limitations—When the Statute will or will not bar, 72.) (Indictment—In what cases an indictment will lie, 41.)

MORTGAGE.

1. A mortgage not registered in time, is ineffectual against purchasers subsequent to the mortgage, whose conveyances are registered before the mortgage. *Cowan v. Green*, 2 Hawks, 384. *S. P. Davidson v. Beard*, *Ibid.* 520. *Tate v. Brittain*, 3 Hawks, 55.

2. A mortgage is good only from the time of its registration. *Ibid.* (See Rev. Code, ch. 37, secs. 22 and 23, as to the present law on the subject.)

3. The act of 1789, passed for the more easy redemption of mortgages, applies in those actions of ejectment only, in which the parties stand in their original simple state of mortgagor and mortgagee. *Devereux v. Marsoratti*, 3 Hawks, 338. (The act of 1789 was re-enacted in the Revised Statutes of 1836, ch. 37, sec. 28, but seems to have been omitted in the Revised Code. See ch. 37, and index title Mortgage.)

4. Where a mortgagee obtained judgment and execution for his mortgage debt, and under the act of 1812 sold the equity of redemption in the mortgaged premises, *it was held* that in a suit by the mortgagor against the purchaser at such sale, that he had no right of action against him at law (whatever might be the equitable rights of either) for the amount of his bid, on the ground of its being a bid for so much beyond the amount due on the mortgage, because the contract of sale was made with the sheriff, and he was not such an agent of the defendant in the execution, as to enable the latter to recover in his own name, from the purchaser, the price of land sold by the former. *Coxe v. Camp*, 2 Dev., 502.

5. Where the mortgagor and mortgagee join in a bargain and sale before the estate of the latter has become absolute, the bargainee is in under the mortgagor. *Wall v. White* 3 Dev., 105.

6. Where the mortgage debt is paid within the period limited by the deed, the estate of the mortgagee is thereby divested, and he has nothing but a possession, which is defeated by the entry of the mortgagor or his vendee; and in such case upon the entry of the vendee of the mortgagor and mortgagee, the bargain and sale becomes the deed of the mortgagor and the confirmation of the mortgagee. *Ibid.*

7. A deed executed to secure recited debts is a mortgage, although it contains neither a *proviso* for redemption nor a declaration of its trusts, and the fact of the trust of the surplus being declared in a separate and unregistered paper will not make it void for the recited debts. *Skinner v. Cox*, 4 Dev., 59.

8. The possession of a mortgagor, or of those claiming under him is the possession of the mortgagee; and if the mortgagor be ousted by a stranger, and regain the possession, he regains it still as the tenant of the mortgagee. *Gwyn v. Wellborn*, 1 Dev. and Bat., 313.

9. An instrument in the form of a bill of sale from A to B for a female slave, with this proviso, "provided if the said A, should well and truly pay unto the said B, the above sum herein mentioned, before his death, then the above obligation to be void—only, the increase, if any, to remain the property of B" is a mortgage to secure the re-payment of the sum advanced and mentioned in the instrument; and if the mortgagor remain in the possession of the slave and her increase during life, and die, leaving the money unpaid, the mortgagee or his personal representatives, may at law recover the slaves of the personal representatives of the mortgagor. *Joyner v. Vincent*, 4 Dev. and Bat., 512.

10. A mortgagee is not, under any circumstances, as between him and the mortgagor, obliged to take possession of the mortgaged property before a forfeiture; and until a forfeiture by the non-payment of the money, the possession of the mortgagor cannot be adverse to the mortgagee, so as to create a bar by the statute of limitations. *Ibid.*

11. A mortgagee, after the day of payment passed, may bring an action of ejectment against the mortgagor, without any notice to quit or demand of possession. *Fuller v. Wadsworth*, 2 Ired., 263.

12. A mortgage was made which was subject to the lien of an execution, under which the land was sold and brought more than enough to satisfy it, and *it was held* that the mortgagee was entitled at law to recover the surplus. *Jones v. Thomas*, 4 Ired., 12.

13. The possession of a widow of land assigned to her in dower, is not adverse to the mortgagee of her husband, or to the assignee of the husband. The widow's estate in her dower land is but a continuation of that of her husband, and is affected by the same estoppels, which attached to it in the hands of the husband. *Williams v. Bennett*, 4 Ired., 122.

14. The mortgagor is concluded by his deed, and, after its execution, his possession is by the consent of the mortgagee and is in law the possession of the mortgagee. *Ibid.*

15. A mortgagor, or one claiming under him, is not entitled to a notice to quit from the mortgagee. *Ibid.*

16. A delay of a mortgagee to enforce the payment of his debt is not fraudulent so as to make his mortgage void, but the creditor may have his remedy in equity, or promptly at law by a sale of the equity of redemption. *Davis v. Evans*, 5 Ired., 525.

17. One who has made a mortgage to secure a debt, may afterwards convey the same property absolutely to the mortgagee in satisfaction of the debt, provided the conveyance be *bona fide* and for a fair price. *Shelton v. Hampton*, 6 Ired., 216.

18. The following sealed instrument was executed between the parties: "Know all men by these presents, that I. E. T. have this day bargained for a sorrel filly with W. G., which filly I want to stand as security until I pay him for her. I also promise to take good care of her." *It was held* that upon the face of the instrument it was doubtful, whether it was intended as a mortgage or conditional sale, and that it was properly left to the jury to determine its character from the accompanying circumstances. *Gaither v. Teague*, 7 Ired., 460.

19. Whether an instrument is a mortgage or not, is a question of law for the court, and it is error to submit it to the jury. *Smith v. Jones*, 13 Ired., 442.

20. The statute presumption of the payment of mortgages, from lapse of time, is payment *at the day* the debt fell due, and the legal estate reverts in the mortgagor without a re-conveyance. As where the owner of land sold it and took a mortgage for the purchase money, and the purchaser entered and continued in possession for more than thirteen years; *it was held* that the condition of the mortgage deed was performed *at the day* and the legal estate reverted in the mortgagor by force of the condition. *Powell v. Brinkley*, Busb., 154. (See Rev. Code, ch. 65, sec. 19.)

21. As between the parties, a mortgage is valid without registration. *Leggett v. Bullock*, Busb., 283.

22. A conveyance of a chattel in writing absolute in the conveying part, to which is added a condition that it shall be void, if the vendor pay to the vendee a certain sum of money which he owes to him, is a mortgage and is void as against creditors if not duly registered. *McFadden v. Turner*, 3 Jones, 481.

23. A mortgagee who has had seven years' possession of the premises under his mortgage deed previously to the entry of a stranger, can recover the possession from him by an action of ejectment whether the mortgage debts have been paid or not. *Bennett v. Williamson*, 5 Jones, 307.

See (Estoppel—By matter other than by record or deed, 9.) (Execution—What may be levied on and sold under execution, 9-10-11-12-13.) (Registration, 9.) (Trover—Where it will lie, 23.) (Usury—What transactions are usurious, 25-26.)

MURDER.

See (Homicide.)

NAVIGATION.

See (Constitution—Acts which have been declared constitutional, 8-10.) (Rivers and Creeks, 1-2-8-9-10-11-12.)

NEGLIGENCE.

See (Action on the case—When the action will or will not lie in other cases, 2-7-8-9-10-15-16-17-19-21-22-23-24-25-26-31-32-33-34-35-36-37-40-41-42-43-44.) (Bailment, 1-2-11-12-13-14-18.)

NEW TRIAL.

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|---|---|
| I. When and upon what terms granted in civil cases. | III. When granted or refused in criminal cases. |
| II. When refused in civil cases. | IV. When ordered or refused by the supreme court. |

I. WHEN AND UPON WHAT TERMS GRANTED IN CIVIL CASES.

1. A new trial granted on payment of full costs, after a non-suit voluntarily suffered, on the plaintiff's making affidavit that a witness by whom he expected to repel the plea of the statute of limitations, had voluntarily withdrawn himself just before the cause was called for trial. *Sheppard v. Salter*, Mar., 40, (31.)

2. Where the law is clearly for the plaintiff, the court will grant a new trial, though several juries have found for the defendant. *Murphy v. Guion*, 2 Hay., 162, (347.) *S. P. Jones v. Ridley*, 2 Car. Law Repos., 397, (280.) *Hamilton v. Bullock*, 2

Hay., 224, (399.) *Commissioners of Fayetteville v. James*, 1 Murph., 40, S. C. Conf. Rep., 556, (514.)

3. After special verdict had been found five years and argued twice, a motion to show cause for a new trial was granted. *Hines v. Wood*, 2 Hay., 220, (394.)

4. If it be proved that the prevailing party has tampered with the jury, a new trial will be granted. *Wright v. Wright*, 1 Car. L. R., 363, (31.)

5. A rule for a new trial may be entered *nunc pro tunc*, the clerk having omitted to enter it at the proper time. *Howard v. Person*, 1 Murph., 100, S. C. 2 Hay., 376, (573.)

6. A new trial was granted to the plaintiff in an action of deceit in the sale of a slave, when the jury found, against very strong circumstantial evidence to prove the deceit, there being no positive evidence of the fact. *Mann v. Parker*, 2 Murph., 262, S. C. 1 Car. L. R., 242, (19.)

7. The court may grant a new trial in an action of slander, when the jury have found a verdict for the defendant in a case where they ought to have given exemplary damages to the plaintiff. *Horton v. Reavis*, 2 Car. L. R., 276, (256.)

8. If a plaintiff be non-suited because not ready for trial when his cause is called, he may, upon a sufficient affidavit, have the non-suit set aside and a new trial granted on the payment of costs. *Williams v. Harper*, 2 Car. L. R., 401, (284.)

9. Where the plaintiff obtains a verdict, but the statement of the case shows he had no title, a new trial must be granted. But if the merits appear to be with him, the court will give him leave to add other counts. *Pollock v. Kittrell*, N. C. Term, R., 152, (585.)

10. Where a defendant upon being sued on a contract, pleads the statute of limitations which plea is true, but the jury disregards it and finds for the plaintiff, the court will grant a new trial, if justice has not been done on the merits. *Spurlin v. Rutherford*, 2 Murph., 360.

11. A *venire de novo* will be granted, where the jury in a special verdict find the evidence and not the facts. *Cherry v. Slade*, 3 Murph., 82.

12. A new trial will be granted for misdirection, although the record does not show that the verdict ought to have been otherwise, had the court directed otherwise. *Tate v. Southard*, 1 Hawks, 45.

13. A new trial will sometimes be granted on the ground of surprise in matter of law, as where the question is really a doubtful one. *Wellborn v. Younger*, 3 Hawks, 205.

14. Where the facts in a special verdict are not sufficient to dispose of all the issues submitted to the jury, no judgment can be given thereon, and a new trial must be awarded. *Humphreys v. Buie*, 1 Dev., 184.

15. When the plaintiff prays proper instructions as to the title of the defendant, which are refused, a new trial will be granted, although if the defendant had prayed proper instructions as to the title of the plaintiff, the judgment would have been correct. *Walton v. Stallings*, 4 Dev., 56.

16. Although a party may get a verdict, notwithstanding an erroneous charge against him upon a particular point, yet if the opinion given may have prevented the other party relying on, or have excluded from the case stated, other evidence that was given, a new trial will be granted. *Jones v. Young*, 1 Dev. and Bat., 352.

17. Where an appeal was taken from the judgment of a justice to the superior court by one of two defendants, but by mistake it was taken up as the appeal of both, was tried as the appeal of both, and upon the trial, the admissions of the party who did not appeal, were given in evidence against the party who did appeal, and after the trial and a verdict in favor of the plaintiff, the justice was permitted, by consent of parties, to amend his proceedings so as to make it the appeal of one only, *it was held* that the verdict ought to have been set aside and a new trial granted; for by the amendment the admissions of the dismissed party were rendered incompetent. *Wilfong v. Cline*, 1 Jones, 499.

See (Forcible Entry and Detainer, 2.)

II. WHEN REFUSED IN CIVIL CASES.

1. The court may properly refuse a new trial when the verdict, though against the weight of the evidence, is in accordance with the justice and equity of the case. *Billew v. Boggan*, 1 Hay., 13, (18.) S. P., *Allen v. Jordan*, 2 Hay., 132, (298,) *Manning v. Brickell*, 2 Hay., 133, (301.)

2. In a hard action against an officer where the jury have found for the defendant, whose conduct has been *bona fide* and according to common practice, though not strictly according to law, the court will not grant a new trial. *Tagert v. Hill*, Tay., 277, (117.) S. C., Conf. Rep., 164, (283.)

3. If a plaintiff supposing himself ready to press a trial, and he finds himself unprepared because his testimony, upon which he relied, is rejected, the allegation of surprise is not sufficient to have the nonsuit set aside and a new trial granted. *Murray v. Marsh*, 2 Hay., 290, (472.)

4. A new trial will not be granted on the ground of surprise, where plaintiff is not permitted to read depositions because of the deponent's being surety for the costs. *Arrington v. Coleman*, 2 Hay., 300, (489.)

5. Where the plaintiff's counsel offered on the trial an attested copy of a bill of sale of a slave, without accounting for the original, and was thereupon non-suited, a new trial was refused,

because it was a case of negligence and not surprise. *Thompson v. Thompson*, 2 Hay., 405, (612.)

6. Surprise in questions of law, if they are really such as to afford room for doubt, forms a ground for a new trial, but not the mistake of counsel in a plain point. *Lester v. Zachary*, 1 Car. L. R. 380, (50.)

7. Where a defendant on a trial for assault and battery produced a witness to prove that notice was given to the plaintiff to produce a warrant on which he rested his justification, and the witness was unable to recollect what the notice required to be produced, the court refused a new trial because the defendant had not stated in his affidavit that he could have justified if he had been allowed to prove the contents of the warrant. *Gardner v. Harrel*, 1 Car. L. R. 381, (51.)

8. In a caveated entry, when the evidence had been fairly and fully submitted to the jury, and the case was one entirely of matter of fact, the court refused a new trial. *McInnis v. McInnis*, 1 Car. L. R. 541, (154.)

9. The court will not grant a new trial upon the affidavit of one of the jurors that he did not agree to the verdict. *Suttrel v. Dry*, 1 Murph., 94.

10. Facts known to a party before trial but not proved, upon the ground that he believed the evidence offered was sufficient, furnish no good reason for a new trial. *Person v. Davy*, 1 Murph., 115.

11. Affidavits of jurors that they had misconceived a material fact, afford no ground for a new trial, particularly when the affidavits appear to be in the handwriting of the party applying for it. *Lester v. Goode*, 2 Murph., 37.

12. It is no ground for a new trial that a bystander remarked that he knew more about the matter in controversy than all the witnesses examined, and then left the court before he could be summoned. *Ibid.*

13. Where the plaintiff neglected to produce on the trial, an essential part of the evidence, a new trial was refused although he alleged that he was taken by surprise because the objection had not been taken on several former trials of the same cause. *Porter v. Wood*, 2 Car. L. R. 248, (226.)

14. Where, on the trial of an issue *devisavit vel non*, the will was attested by two witnesses, one of whom was absent from the state and whose credibility was impeached at the trial, so that the will was proved only by the other, whose testimony if credible, the court instructed the jury, was sufficient to establish the will, although the absent witness was proved to be unworthy of credit, the jury found against the will, and the court refused to grant a new trial. *Wright v. Wright*, 2 Car. L. R. 625, (429.)

15. In action of *tort*, the court will not grant a new trial for

excessive damages, unless they are grossly extravagant. *Dodd v. Hamilton*, N. C. Term R., 31, (471.)

16. If the jury find against the plea of usury, though the verdict may be against the weight of evidence, yet if it be a case of some doubt whether usury was committed, the court will refuse to grant a new trial. *King v. Hill*, N. C. Term R., 211, (644.)

17. A new trial will not be granted on an affidavit for the absence of a material witness under circumstances which would not have induced the court to continue the cause for the absence of the witness. *Peebles v. Overton*, 2 Murph., 384.

18. Where a defendant moved for a new trial upon the ground that a copy of a deed under which it was alleged that he claimed, was admitted, although no notice had been given to him to produce it, the new trial was refused because he declined to make affidavit that he did not claim under the deed, and it did not appear that any injustice had been done by the verdict. *Wagstaff v. Smith*, 2 Hawks, 45, S. P. *Clark v. Blount*, 3 Hawks, 208.

19. If a release be offered in the course of a trial to render a witness competent, and it is read without objection made at the time as to the want of the proof of its execution by the subscribing witness, such objection cannot be raised after a verdict as the ground of a new trial. *Tatem v. Paine*, 4 Hawks, 64.

20. Where an objection, which would have been a mere matter of form, if made on the trial, is not made until after a full and fair trial, a new trial should not be granted. *Moore v. McNairy*, 1 Dev., 319.

21. In trespass, when not guilty and justification are pleaded, and the jury find the defendant not guilty, the rejection of admissible testimony pertinent to the latter issue only, is not ground for a new trial. *Pierce v. Myrick*, 1 Dev., 345.

22. If a question of law be improperly submitted to the jury, and they decide it correctly, there is no ground for a new trial. *Smith v. Shepard*, 1 Dev., 461.

23. Where evidence proper for one purpose, was, by the counsel who introduced it, urged to the jury as proof of a fact, to which it was incompetent, and the counsel on the other side replied to this argument, but moved for no specific instructions upon the point from the bench, it was held that there was no ground for a new trial. *Simpson v. Blount*, 3 Dev., 34.

24. Where there are several counts in a declaration, and on one of them improper evidence is received, if the party against whom the evidence was offered, obtained a verdict on that count, he has no right to a new trial on the other, on which the verdict was against him. *Young v. Hairston*, 3 Dev., 55.

25. The admission of improper testimony, not objected to by the opposite, is no ground for a new trial. *Green v. Harman*, 4 Dev., 158.

26. The refusal by the court to permit a witness to be re-examined, is no ground for a new trial, as the refusal was a matter of discretion with the court. *Barton v. Morphis*, 4 Dev., 240.

27. Where no particular instructions were asked on the trial, a new trial will not be granted, unless the party praying it, can show that the jury was probably misled by the charge of the judge. *Torrence v. Graham*, 1 Dev. and Bat., 284.

28. The reception of improper testimony will not be a ground for a new trial, if the only effect of such testimony can be to remove or weaken improper testimony introduced on the other side. A judgment will not be reversed for inadvertencies or mistakes which did not and could not affect the rights of him who complains of them. *Ingram v. Watkins*, 1 Dev. and Bat., 442.

29. Where testimony, competent for one purpose but not another, was admitted after objection, but no instruction as to its effect was prayed for, and it did not appear for what purpose it was used, *it was held* that its reception alone could not be assigned as a ground for a new trial. *Dobson v. Murphey*, 1 Dev. and Bat., 586.

30. Matters which might be introduced on the trial of a case, but which were not brought forward until a motion was made for a new trial, should not be acted on by the court. *Gibson v. Partee*, 2 Dev. and Bat., 530.

31. If evidence strictly irrelevant has been admitted, a right verdict ought not to be set aside and a new trial granted on account of its reception, unless it is perceived that it worked a prejudice to the party. *May v. Gentry*, 4 Dev. and Bat., 117.

32. Where matters might have been offered in evidence on the trial, but were not, they form no ground for granting a new trial. *Reed v. Moore*, 3 Ired., 310.

33. It is no ground for a new trial, that a challenge of a juror by a party has been improperly overruled, where the cause has been tried by a jury to whom the party had no objection, not having been prevented from exercising his privilege of challenging four jurors peremptorily. *Whitaker v. Carter*, 4 Ired., 461.

34. Where a part of the charge of the court to the jury related to a matter totally immaterial, benefitting neither plaintiff nor defendant, it is no ground for a new trial. *Ratliff v. Huntly*, 5 Ired., 545.

35. Where a question of law is left to the jury, and the verdict shows that they decided it properly, it is no ground for a new trial. *Marshall v. Fisher*, 1 Jones, 111.

36. Where the judge erred on the trial in ruling out testimony, but it proposed by the opposite counsel to waive the objection and permit the testimony to be received, which the counsel who had offered it declined; *it was held* that the error was

cured and the party was not entitled to a new trial. *Marshall v. Flinn*, 4 Jones, 199.

37. When testimony offered to prove a fact may have been improperly rejected, yet it will be no ground for a new trial if the court assumes such fact to be true in the charge to the jury. *Thompson v. Morris*, 5 Jones, 151.

38. Where a judge improperly rejected evidence as to a particular fact material to the issue, but afterwards on instructing the jury, told them to consider the fact as proved and to give the party offering the evidence the full benefit of it in making up their verdict; *it was held* that the error was corrected, and that it was no ground for a new trial. *Morehead v. Brown*, 6 Jones, 367.

39. Where a judge gave instructions not material to any point in the cause, it is no ground for a new trial whether the instructions were correct or not. *Shaw v. Etheridge*, 7 Jones, 225.

40. It is no ground for a new trial that the court refused to permit a fact to be proved, which was admitted by the opposite party. *Pridgen v. Bounerman*, 8 Jones, 53.

41. If the court erroneously submit a question of law to the jury, and they, by their verdict, decide it correctly, it is not a ground for a new trial. *Stokes v. Arey*, 8 Jones, 66.

42. An error in the charge of the judge to the jury, which can not have done an injury to the losing party, is no ground for a *venire de novo*. *Fagan v. Williamson*, 8 Jones, 433.

III. WHEN GRANTED OR REFUSED IN CRIMINAL CASES.

1. Where one was convicted of perjury, and before sentence, there was another trial of the suit in which the perjury was alleged to have been committed and in that trial, the court doubted whether the person charged with perjury had sworn falsely, there was a new trial granted him on that ground. *State v. Greenwood*, 1 Hay., 141, (162.)

2. It is no ground for a new trial that one of the jurors was not a freeholder. *Ibid.* S. P., *State v. Crawford*, 2 Hay., 298, (485.)

3. When the charge of the judge upon the law arising from the evidence is partly right and partly wrong, and it cannot be told upon what part of the evidence the verdict was found, a new trial will be granted. *State v. Jernagan*, N. C. Term, R., 44, (483.)

4. When a defendant in an indictment has been tried without any issue having been joined, the court will award a *venire de novo*, either to the defendant or to the State. *State v. Hardie*, 3 Murph., 232.

5. The supreme court cannot grant the prisoner, even in a

capital case, a new trial, upon the ground that the jury have found contrary to evidence. *State v. Jeffreys*, 3 Murph., 840.

6. A new trial will not be granted to a prisoner, because a juror, who had sworn that he had not formed an opinion as to the guilt or innocence of the prisoner, had remarked to a person a few minutes before "that he could not serve because he had made up an opinion. *State v. Scott*, 1 Hawks, 24.

7. A new trial will be granted to a prisoner, if improper testimony have been admitted, though there was sufficient testimony to justify his conviction without it. It cannot be told upon which testimony the jury relied. *State v. Allen*, 1 Hawks, 6.

8. After an acquittal of a defendant on a state prosecution, a new trial cannot be granted. *State v. Taylor*, 1 Hawks, 462, S. P. *State v. Martin*, 3 Hawks, 381.

9. When a question of law has been improperly left to the jury, but has been correctly decided by them, a new trial will not be granted. *State v. Jackson*, 2 Dev., 563.

10. Where, on a trial for murder, the prisoner proved his general peaceable demeanor, and the judge informed the jury that evidence of character was entitled to but little weight, where facts were positively sworn to, and it was doubtful, from the case, whether this instruction referred to the fact of killing, or to the amount of provocation, a new trial was granted. *State v. Lipsey*, 3 Dev., 485.

11. The effect of the separation of the jury, before they return their verdict, and the difference between a new trial and a *venire de novo* discussed and stated at length. *State v. Miller*, 1 Dev. and Bat., 500.

12. An assumption by a judge in his charge, that a fact deposited to is true, but which, if true, cannot prejudice the prisoner, is no ground for a new trial. *Ibid.*

13. When the attorney general, upon an appeal by the defendant on an indictment, informs the supreme court that he has looked into the record, and that he consents that the *venire de novo* prayed for should be granted, the court will, as a matter of course, grant the *venire de novo*, without examining into the errors assigned. *State v. Valentine*, 7 Ired., 141.

14. In a capital trial, if the judge eulogise a witness it is not a ground for a *venire de novo*, if the statement of the case, which is the plaintiff's bill of exceptions, shows that such a witness was unimpeachable. *State v. Harris*, 1 Jones, 190.

15. Where a judge in charging the jury in a case of homicide presents two views of the evidence, in one of which his instruction is erroneous, though the other was right, if it be left uncertain whether or not the verdict was predicated on the erroneous instruction, the defendant is entitled to a *venire de novo*. *State v. Ingold*, 4 Jones, 217.

16. When the error complained of in the charge of the judge

is such that it could not in any degree affect the prisoner's case to his prejudice, a *venire de novo*, will not be ordered. *State v. Frank*, 5 Jones, 384.

17. An erroneous remark of a judge upon the weight of testimony which was inadmissible, and which remark could not have influenced the verdict, is not a ground for granting a new trial. *State v. Neville*, 6 Jones, 423.

18. It is error for the judge to leave to the jury the decision of a fact on which the admissibility of evidence depends. But if the prisoner making the exception could not have been injured by it, the error is not a ground for a new trial. *State v. Dick*, 2 Winst., 45.

IV. WHEN ORDERED OR REFUSED BY THE SUPREME COURT.

1. When the transcript sent to the supreme court contains so imperfect a statement of facts, that the court cannot decide satisfactorily to themselves, a new trial will be ordered. *Hatton v. Dew*, 1 Car. L. R., 524, (137.) S. P., *Gilky v. Dickerson*, 2 Hawks, 341. *Banner v. McMurray*, 4 Hawks, 93. *Stote v. Upton*, 1 Dev., 268. (Overruled, see *Pickett v. Pickett*, 3 Dev., 6., *Thomas v. Alexander*, 2 Dev. and Bat., 385.)

2. A case being sent to the supreme court upon a particular point, and the court upon looking into the record and discovering that there were other material points arising in the case and connected with its merits, declined deciding the point sent up and awarded a *venire de novo*, that all the circumstances relating to the points discovered in this court, might be examined in the court below. *Cowan v. Green*, 3 Murph., 569.

3. It is not a ground for the supreme court to grant a new trial, that the court below has not stated the case on the record; for the appeal is not necessarily from the opinion of the court on points arising out of the facts at the trial, but may be for error in the pleadings. *Frazier v. Felton*, 1 Hawks, 231.

4. When the statement of the facts of a case before the supreme court is such as to admit of two views of them, and it is doubtful which is the correct one, and according to one of the views, the law has not been properly administered in the court below, a new trial will be ordered. *Love v. Wall*, 1 Hawks, 313.

5. Where it appears from the certificate of the judge, that a case was intended to be made out by him, but none comes up with the record, the supreme court will order a *venire de novo*. *Hamilton v. McCulloch*, 2 Hawks, 29, S. P. *State v. Powers*, 3 Hawks, 376. *Anderson v. Hunt*, *Ibid*, 244.

6. When the transcript of the record showed merely that the court below decided upon the law and the jury returned a general verdict on the facts, a new trial was refused. *Jenkins v. Langdon*, 2 Hawks, 386.

7. When a new trial is moved on the ground that the verdict is contrary to law, and the charge of the court below is not erroneous as to the law, the supreme court cannot order a new trial, for it has not the power to ascertain that the verdict is contrary to law. *Newbern Bank v. Pugh*, 2 Hawks, 389.

8. Where a judge refused further testimony after the close of the arguments to the jury on the authority of a former case, which, in his opinion, prevented the exercise of his discretion in the reception of further testimony under such circumstances, a *venire de novo* was granted by the supreme court. *Williams v. Averitt*, 3 Hawks, 308.

9. Where upon a transcript and statement of the case sent to the supreme court, it appears that the charge of the court was not applicable to the facts stated, a new trial must be granted, for if there were no other evidence but that stated, the charge was irrelevant, and if there were other evidence, it should form part of the case. *Finch v. Elliott*, 4 Hawks, 61.

10. Where a judge below is correct in his statement of a rule of law, but makes a misapplication of it, yet a new trial will not be granted, if it appear from the finding that the jury were not misled. *Tatem v. Paine*, 4 Hawks, 64.

11. When *non detinet*, or *non assumpsit*, and the statute of limitations, are pleaded in detinue or assumpsit, and the jury find the general issue for the defendant, the court will not, on a motion for a new trial, examine into the correctness of the charge on the statute. *Morisey v. Bunting*, 1 Dev. 3, S. P. *Bullock v. Bullock*, 3 Dev., 260. *Martin v. Waugh*, 2 Dev. and Bat., 517.

12. A new trial is a matter of discretion, and a refusal to grant one cannot be assigned as error. The supreme court is a court of errors in law, and the case stated by the judge is a substitute in our practice for a bill of exceptions; hence, this court cannot grant a new trial, for the reason simply that the judge below refused one, because that refusal is not error; but where the court below errs, as in receiving evidence, instructing the jury and the like, this court will order a *venire de novo*, as a means of correcting such error. *State Bank v. Hunter*, 1 Dev., 100.

13. A new trial for surprise can only be granted in the court where the trial was had, and not in an appellate court. *Lindsay v. Lee*, 1 Dev., 464.

14. When a verdict is against the evidence, a new trial can be granted only by the judge who tried the cause. *Alley v. Hampton*, 2 Dev., 11.

15. Where the judgment in the superior court was rendered upon a point reserved, which did not appear on the record, the remedy is for the supreme court to order a *venire de novo*. *Dunett v. Barksdale*, 2 Dev., 251.

16. Under the act of 1777, respecting non-suits, where the superior court has no jurisdiction, the court will not order a non-

suit, unless on motion of the defendant; and where there has been no such motion, but a verdict and judgment for the plaintiff, the supreme court will not order a new trial. *Allison v Hancock*, 2 Dev., 296.

17. The supreme court will not order a new trial on the ground of excessive damages, that being a matter exclusively within the discretion of the court below. *Young v. Hairston*, 3 Dev., 55.

17. Where a party against whom a judge expresses an opinion refuses to submit to it, but puts his case to the jury and is successful; a new trial will not be granted, though the judge may have erred, if, upon the whole case the verdict is correct. *Grice v. Ricks*, 3 Dev., 62.

19. Where the defendant must finally prevail, a new trial will be ordered, although the judgment below was for the plaintiff, and he appealed. *Mordecai v. Parker*, 3 Dev. 425.

20. Where, in the court below, a new trial was moved for, because the judge expressed an opinion on the weight of evidence, and the case, certified with the record, stated no instance in which it had been done, but that the judge was unconscious of having done so, *it was held* that the supreme court, having no power to ascertain the fact, could not order a new trial. *State v. Lipsey*, 3 Dev., 485.

21. The supreme court cannot set aside a verdict and grant a new trial, though in their opinion, the verdict was found upon slight testimony. *Goodman v. Smith*, 4 Dev., 450.

22. The supreme court cannot grant a new trial upon the ground that the verdict was against the evidence or the weight of the evidence, that being a matter of discretion with the judge who presides at the trial in the court below, which cannot be revised upon appeal. *Long v. Gantley*, 4 Dev. and Bat., 313.

23. The supreme court cannot reverse a judgment of the superior court and order a new trial, because of the alleged finding of excessive damages by the jury, or of the refusal of the judge to set aside that finding, that not being a question of law but of discretion. *McRae v. Lilly*, 1 Ired., 118.

24. If the charge of the judge to the jury be correct, or be such that the party against whom a verdict is found cannot complain of it, a mistake of the jury in finding a verdict without evidence, or against evidence or against the law, can only be corrected by the judge presiding at the trial, and cannot be revised by the supreme court upon an appeal. *Terrell v. Wiggins*, 1 Ired., 172.

25. Surprise on the trial furnishes no ground for the interference of the supreme court, it being matter for the sole consideration of the court below on a motion for a new trial. *Wall v. Hinson*, 1 Ired., 276.

26. Where the judge below has misdirected the jury, and yet the verdict has been such as it ought to have been, had there

been no misdirection, the supreme court will not order a new trial. It will do so only where the misdirection has misled the jury into a wrong verdict. *Reynolds v. Magness*, 2 Ired., 26.

27. Although it is erroneous to submit to the jury an enquiry of fact, as to which there is no evidence, yet this court will suppose the evidence, as stated in the case brought up from the court below, to have been stated only in reference to the objections there raised, and will not grant a new trial, where an exception as to the total want of evidence, does not appear to have been taken, either on the trial, or on a motion for a new trial. *Reed v. Moore*, 3 Ired., 310.

28. Where the plaintiff against whom the judge in his charge commits an error obtains the verdict, the defendant will be entitled to a new trial, if the principle so erroneously laid down, might have prevented his making a full defence. *Clarke v. Diggs*, 6 Ired., 159.

29. A verdict on the merits of the case is to be set aside, and a new trial granted only for an error of the superior court practically prejudicial. *Smith v. Smith*, 8 Ired., 29.

30. In order to obtain a *venire de novo* for the admission of improper evidence, it is not sufficient to state matter rendering it probable that such evidence may have been received, but it is indispensable to state the evidence itself; otherwise the supreme court cannot see that the evidence was illegal, and judgment will be affirmed. *State v. Clark*, 12 Ired., 151.

31. When in detinue there is a verdict for the plaintiff, and an error in the assessment of damages only, a *venire de novo* will not be ordered. *McAllister v. McAllister*, 12 Ired., 184.

31. A party claiming a new trial, because of evidence improperly rejected, must set forth in his bill of exceptions, what was the evidence tendered, in order to enable the supreme court to decide upon its relevancy. *Overman v. Coble*, 13 Ired., 1.

33. Where there is error in the charge of a judge, which was excepted to, the supreme court will order a *venire de novo*, unless the appellee can show conclusively from the record, that the error could not in any wise have affected the verdict. *Chunn v. Patton*, 13 Ired., 421.

34. The supreme court will order a *venire de novo*, where the judge in the court below has submitted a material fact to the jury without any evidence to support it. *Commissioners of Beaufort v. Duncan*, 1 Jones, 234.

35. Where it appears from the record proper sent to the supreme court, that on the trial below, a question of law was reserved by the court, to which the verdict was subject, and that question was decided in favour of the defendant, upon which the verdict was set aside and a nonsuit ordered, but upon an appeal by the plaintiff, the judgment fails to state what that question

was, there must be a *venire de novo*. *Brown v. Kyle*, 2 Jones, 442.

36. Where an error in the judge's charge is favorable to the party excepting, the supreme court will not order a *venire de novo*. *Ray v. Lipscomb*, 3 Jones, 185.

37. The supreme court will not order a *venire de novo* for the admission of testimony entirely immaterial, and which could not affect the case in any way. *Ernull v. Whitford*, 3 Jones, 474.

38. The supreme court will order a *venire de novo* for the admission of immaterial evidence, when it was calculated to mislead the jury and may have done so. *Patton v. Porter*, 3 Jones, 539.

39. A new trial can only be granted in the superior court upon the ground that the verdict is against the weight of evidence and cannot for that cause be ordered by the supreme court. *Boykin v. Perry*, 4 Jones, 325.

40. Where the question was whether bonds could be endorsed by the statute law of another state, and no evidence of such statute law was produced on the trial in the court below, the supreme court will not grant a new trial for an error caused by such omission, if it be certified to the court by the secretary of state that, from the statutes of such state filed in the executive office, it appears that bonds are made negotiable in that state. *Grace v. Hannah*, 6 Jones, 94.

41. Where the instructions given in the court below could not in any degree prejudice the cause of the exceptant, even if erroneous, it is no ground for the supreme court to order a *venire de novo*. *Hobbs v. Outlaw*, 6 Jones, 174.

42. When the general issue is pleaded together with special pleas, and the jury find all the issues in favor of the defendant, the supreme court cannot reverse the judgment and order a new trial for error in the charge of the judge respecting the matter of the special pleas. *Higdon v. Chastaine*, 1 Winst., 212.

43. When a question arises on a jury trial concerning the competency of a witness, and the parties disagree about the facts on which the witness' competency depends, and the judge decides that the witness is competent, but does not state the facts which he finds to be proved, this court cannot see whether his decision as to competency of the witness was right or not, and it will on that account order a *venire de novo*. *State v. Norton*, 1 Winst., 303.

See (Practice—In the supreme court, 79.)

NOLLE PROSEQUI AND NONSUIT.

See (Practice—Nonsuit and Nolle prosequi,) (Indictment—Effect of a nolle prosequi,) (Indictment—Of the trial, verdict and judgment, 24-25-55.)

 NUISANCE.

1. For any of those acts which are in the nature of a public nuisance, no individual is entitled to an action, unless he has received an extraordinary and particular damage not common to the rest of the citizens. *Dunn v. Stone*, 2 Car., L. R. 261 (241.)

2. To render an act indictable as a nuisance, it is necessary that it should be an act so inconvenient and troublesome as to annoy the whole community, and not merely particular persons. Therefore, where it was charged that the defendants assembled at a public place, and profanely and with a loud voice, cursed, swore and quarrelled in the hearing of divers persons, then and there assembled whereby a certain singing school was broken up and disturbed "to the common nuisance," &c., *it was held*, that the indictment could not be sustained as one for a common nuisance. *State v. Baldwin*, 1 Dev. and Bat., 195.

3. A stable in a town is not, like a slaughter pen or a hog sty, necessarily, or *prima facie*, a nuisance. But if it be so built, so kept or so used, as to destroy the comfort of persons owning and occupying adjoining premises, and impairing their value as places of habitation, it becomes thereby a nuisance. *Dargan v. Waddill*, 9 Ired. 244.

4. If the adjacent proprietors be annoyed by it in any manner which could be avoided, the stable becomes an actionable nuisance, though it be in itself a convenient and lawful erection. *Ibid.*

5. Upon a charge for keeping a disorderly house, it appeared that the defendant lived in the country, remote from a public road, and that loud noises and profane swearing were often kept up by his five sons, whom he did not encourage, save by his bad example in getting drunk himself, but sometimes endeavored to keep them quiet, by which disorder, only two families in a thickly settled neighborhood, were disturbed; *it was held*, not to amount to a common nuisance. *State v. Wright*, 6 Jones, 25.

See (Indictment—In what cases an indictment will lie, 10-14-16-68,) (Indictment—Form and matters relating thereto, 30-78-79-82-140-141.)

OFFICERS AND OFFICES.

1. It is the duty of public officers who are paid for their services, to furnish blanks to be executed by individuals who have business to transact with them in their official characters. *Mann v. Vick*, 1 Hawks, 427.

2. An office is the property of the incumbent. *Hoke v. Henderson*, 4 Dev. 1.

3. In the absence of constitutional restriction, the creation, continuance, duties and emoluments of an office, are matters of political expediency, and to be judged of solely by the legislature. But it cannot continue an office, and oust the incumbent or lessen the tenure of his office, or transfer his right to another. *Ibid.*

4. Offices, that are only political agencies, may be vacated at any time; those to which a personal interest is attached, can only be vacated upon conviction for a default. *Ibid.*

5. Offices are held at the will of both parties, and though an officer may resign, yet, if his resignation be not accepted, it is nothing, and he still remains in office. *Ibid.*

6. A person who undertakes an office, and is in office *de facto*, although not legally appointed thereto, is bound to perform all the duties, and is liable for their omission, in the same manner, as if the appointment were strictly legal, and his right perfect. *State v. McEntire*, 3 Ired., 171.

7. The acts of officers *de facto* are as effectual, so far as the rights of third persons or the public are concerned, as if they were officers *de jure*. *Burke v. Elliott*, 4 Ired., 355.

8. What shall constitute an officer *de facto* may admit of doubt in different cases. The mere assumption of the office by performing one or even several acts appropriate to it, without any recognition of the officer by the appointing power, may not be sufficient to constitute him an officer *de facto*. There must at least be some colorable election and induction into office *ab origine*, and some action thereunder, or so long an exercise of the office and acquiescence therein of the public authorities, as to afford to an individual citizen a strong presumption, that the party was duly appointed, and therefore, that every person might compel him for the legal fees, to do his business, and for the

same reason was bound to submit to his authority, as the officer of the country. *Ibid.*

9. The acts of officers *de facto* acting openly and notoriously in the exercise of the office for a considerable time, must be held as effectual when they concern the rights of third persons or the public, as if they were the acts of rightful officers. *Gilliam v. Reddick*, 4 Ired., 368.

10. Where one has been appointed a coroner of a county, though it may appear that he has not renewed his official bonds as required by law, yet his acts as coroner *de facto*, are valid, at least as regards third persons. *Mabry v. Turrentine*, 8 Ired., 201.

11. The Revised Code, ch. 78, sec. 5, gives a summary remedy against public officers only to creditors and others who are entitled to the money in the hands of the officer, so that a new clerk cannot proceed under it against a former clerk, for not paying over office money to him as his successor. *O'Leary v. Harrison*, 6 Jones, 338.

12. Persons entering into office under color of an irregular election, are thereby constituted officers *de facto*, and their official acts have full force until they are removed by a writ of *quo warranto*. *Commissioners of Trenton v. McDaniel*, 7 Jones, 107.

13. While an office continues, the legislature cannot oust an incumbent during the term for which he has been chosen. *Cotten v. Ellis*, 7 Jones, 545.

14. The legislature may increase or reduce the salaries of all such officers as are not protected by the constitution during their term of office, but it cannot deprive them of the whole salary. *Ibid.*

15. The acts of one purporting to be an officer, are evidence of his authority, and such acts, as to third persons, are to be taken as valid, while the incumbent is thus acting. *Swindle v. Warden*, 7 Jones, 575.

16. The office of brigadier general under the Confederate States was held to be incompatible with that of adjutant general of the State of North-Carolina, and the acceptance of the former office was held to vacate the latter which was held at the time of such acceptance. *In the matter of General J. G. Martin*, 1 Winst., 153, in the appendix.

See (Constitution—Construction of various clauses of the constitution, 19.) (Indictment—In what cases an indictment will lie, 7-8-37-42-83-89.) (Indictment—Form and matters relating thereto, 84-97-153.) (Indictment—Of the trial, verdict and judgment, 5.)

OVERSEERS.

1. The forfeiture upon an overseer by the act of 1741 for leaving his employer's service during the time for which he was employed, does not attach to a case, where by the stipulation of the parties, the overseer may leave, or the employer may discharge him, at pleasure. *Steed v. McRae*, 1 Dev. and Bat., 435. (See Rev. Code, ch. 80.)

2. A contract for service as an overseer, in which it is stipulated that the overseer may leave his employer's service, or his employer may discharge him, at pleasure, will be construed so as to give the overseer a *pro rata* compensation during the time he may serve. *Ibid.*

3. An overseer is not strictly a bailee, though many of the principles of that relation, and many of its duties attach to him. It is his duty to take such care of the property entrusted to him, as a man of ordinary prudence would take of his own property. *Smith v. Cameron*, 11 Ired., 572.

4. Where an overseer was employed for a year and served during that time, *it was held*, in a suit for stipulated wages, that the employer was not at liberty to show that the plaintiff was lazy and trifling and had made a poor crop. *Hobbs v. Reddick*, 5 Jones, 80.

5. Where an overseer was employed upon a special contract by the year, and was turned off by his employer during the year without sufficient cause, and afterwards sought and obtained other employment during the same year, *it was held*, in an action to recover the full price from the employer, that what the overseer had made by other employment during the year ought properly to be allowed in mitigation of damages. *Hendrickson v. Anderson*, 5 Jones, 246.

6. Whether the misconduct complained of by an employer against his overseer was a sufficient cause for dismissing him, is a question of law for the court. *Ibid.*

7. An overseer cannot maintain an action for his wages if he misconducts himself in such a manner as to justify his employer in dismissing him; and it will be such misconduct for him to frequent grogshops in his neighborhood during the hours of the day when he ought to be attending to the business of his employer. *Fly v. Armstrong*, 5 Jones, 339.

8. It is a good ground for discharging an overseer that he assumed to control the slaves under his care, against the known wishes and positive commands of his employer. *Lane v. Phillips*, 6 Jones, 455.

9. Where an overseer acts so badly as to compel his employer to dismiss him before the end of the time for which he contrac-

ted to serve, he cannot recover any thing for services rendered previous to such discharge. *Ibid.*

10. Where an overseer was discharged for good cause, and the employer offered to pay him *pro rata* for the time he had served, which he refused to take, he cannot recover the amount thus tendered afterwards. *Ibid.*

OVERSEERS OF ROADS.

See (Highway, 3-4-17-20-31-33-39-44.)

PARDON.

The Governor cannot, under the constitution, add to or commute a punishment; but under the pardoning power, he may remit a part of the fine. *State v. Twitty*, 4 Hawks, 193.

2. Where it appears from the record of the court, and from the pardon itself, that it was obtained upon false suggestions, it is void, and may be so treated by the court. *State v. McIntire*, 1 Jones, 1.

3. When it appears from the pardon itself, that the Governor thought the defendant had been sentenced to pay a fine, as well as to be imprisoned, and the imprisonment is remitted upon condition that the fine be paid, when in fact there is no fine, the pardon is void. *Ibid.*

4. The Governor may pardon a portion of the punishment after it is fixed by the judgment; but it is questionable whether he can pardon a portion of the supposed punishment, where it is discretionary, before it is fixed by the judgment. *Ibid.*

5. Though the pardoning power is undoubtedly general, yet if the punishment be at the discretion of the presiding judge, the presumption is that it will only be exercised in extreme cases. *Ibid.*

6. *It seems* that the statute pardon, which is incident to the benefit of clergy, does not take effect until the party is burned in the hand and delivered out of prison. If the record of the court omit to show the execution of the sentence, the party claiming the benefit of such pardon, may show it by a witness. *Keith v. Goodwin*, 6 Jones, 398.

(The benefit of clergy, with all its incidents, is now abolished. See Rev. Code, ch. 34, sec. 22 and 23.)

PARTIES.

1. It is not error to refuse to dismiss a case on motion for want of parties, though it may be error to decree finally without them. *Morrison v. McElrath*, 4 Dev. and Bat., 474.

2. Where a paper under which a plaintiff in a petition claims to be an assignee, does not on its face purport to be an assignment, but only an order for money, it is necessary that the alleged assignor or his personal representative should be a party to the petition, either plaintiff or defendant. *Clark v. Edney*, 6 Ired., 50.

3. On a petition against administrators for a distributive share of an estate, all persons entitled to distribution should be made parties. *Ibid.*

4. The plaintiffs sued out a writ against a defendant, which was returned "*non est inventus*," and it was held that they might in their joint names sustain an action for a false return, both as informers, or as the parties grieved. *Houser v. Hampton*, 7 Ired., 333.

5. Where money has been paid into a clerk's office upon a judgment, and the judgment is assigned, or the attorney's receipt for the note on which the judgment was obtained has been transferred, by the plaintiff in the judgment to a third person, such assignee has no right to sue the clerk for the money in his own name, as he had but an equitable interest. *State v. Miller*, 11 Ired., 235.

6. Where a debtor delivered to his creditor, without endorsement, a bond on a third person as collateral security, with an agreement that it should be returned if not collected, and the creditor handed it to a constable for collection and took from him a receipt as for himself, it was held in a suit on the constable's official bond for a default in not collecting, that the creditor was the proper person to be made relator. *Chipley v. Alred*, 8 Jones, 204.

See (Partnership—What constitutes a partnership, &c., 7-19.) (Penal Statutes, 17.) (Pleading—Of the writ and declaration, 20-21-36.)

PARTITION.

1. Where there was a devise of three lots to A, B, C, and A died, whereby his lot descended to B, who sold two of the lots, leaving the third, *held* to be evidence of a partition and that the third was assigned to C. *Slade v. Green*, 2 Hay., 75, (242,) S. C. Tay., 111, (66.)

2. To render a partition among co-heirs under an order of the county court, valid, it must appear that a petition was filed, that all the heirs were represented, that the commissioners were sworn, and that they returned their proceedings under their hands and seals; and a partition made without these requisites, is not validated by the assent of the heirs at the time, nor by their subsequent acquiescence. *Anders v. Anders*, 2 Dev., 529.

3. A partition cannot be made by tenants in common by parol. *McPherson v. Sequine*, 3 Dev., 153.

4. A proceeding for partition at law cannot take place unless there be a common possession; and a common possession is always implied from a common title, until the contrary be shown. But if an actual ouster of one tenant in common be made by his co-tenant, there is no longer a common possession, and the remedy is not by a petition for partition, but by ejectment. *Thomas v. Garvan*, 4 Dev., 323.

5. The report of commissioners appointed to divide the lands of intestates, under the acts of 1787 and 1801, will be presumed to be correct and be confirmed, although one dividend of land be nearly double, and another not half the average value of the shares, unless something improper appears on the face of the return, or is shown by extrinsic proof. *Nicelar v. Barbrick*, 1 Dev. and Bat., 257. (See Rev. Code, ch. 82, secs. 1 and 3.)

6. A judgment merely that the report of commissioners to divide land "be confirmed," without ordering it to be recorded, and giving judgment for the costs, *it seems*, is an interlocutory and not a final judgment. *Ibid.*

7. Where slaves on the petition of the owners have been ordered to be sold for a division, a person who was no party to the petition, but claimed by a lien under an execution against one of the petitioners before the sale, has no right to apply to the court to have the share of such petitioner in the proceeds paid over to him. *In the matter of Harding*, 3 Ired., 320.

8. Where a petition was filed in the county court for the partition of slaves among tenants in common, an order was made and the commissioners made a division and a return of their report, which was confirmed, assigning to the agent of one of the petitioners a certain number of slaves, and also a sum of money to be paid to him as agent by another of the petitioners for equality of partition; no formal decree, however was drawn,

and *it was held*, that the agent could not, by a notice in his own name, call upon the other petitioners to have the decree entered in his favor, or to pay the sum so awarded. *Irwin v. King*, 6 Ired., 219.

9. The act of 1829 for the partition of slaves or other personal chattels applies only to a plain legal tenancy in common, and not at all to a suit against an executor for negroes, as part of a legacy to two or more persons in common. In the latter case the rights cannot be ascertained until the administration has been closed, or all the accounts have been taken, and the executor is proceeded against in his character of a trustee for the legatees. *Amis v. Amis*, 7 Ired., 219. (See Rev. Code, ch. 82, sec. 17.)

10. The law gives to tenants in common an absolute right to have their land divided; and the decree for partition should show on its face, the particular land to be divided, and the portion or share of the land to which each of the tenants is entitled. *Ledbetter v. Gash*, 8 Ired., 462. (See Rev. Code, ch. 82, sec. 1.)

11. On a petition for the partition of slaves, where the defendant denies the petitioner's right, and insists that he, the defendant, is entitled to the slaves in severalty, it is not necessary for the petitioner, as in the case of a petition for the partition of land, to establish his right at law, before the relief he seeks, can be granted. The court in which the petition is filed must decide the question of right. *Edwards v. Bennett*, 10 Ired., 361.

12. Property held by partners in a firm, is not the subject of a proceeding for partition under the act of 1829, Rev. Stat., ch. 85, sec., 18, whether the proceeding be by the partners or their assignees—such cases can only be properly dealt with in a court of equity. *Flanner v. Moore*, 2 Jones, 120. (See Rev. Code, ch. 82, sec. 17 and 18.)

13. A dissolution of the co-partnership without a settlement of its affairs, does not convert the members of the firm, or the purchasers of the partnership effects under them, into tenants in common so as to authorize a proceeding for a partition under the act. *Ibid.*

14. In a petition filed in a court of law for partition of land, where the defendant denies the tenancy in common by a plea of "sole seizin in himself," the court of law will itself try the question of title thus raised, as an action of ejectment need not be brought except when it is ordered by a court of equity, when the title is disputed in a proceeding for partition in that court. *Purvis v. Wilson*, 5 Jones, 22.

15. Where, on a petition for the partition of slaves, the county court ordered that partition should be made in certain proportion, and appointed commissioners to make it accordingly, and on appeal to the superior court, the order was reversed, and the

division directed to be made in a different proportion, *it was held* that the superior court was not in possession of the whole case by the appeal, and that a *procedendo* to the county court was proper. *Millsaps v. McLean*, 1 Winst., 80.

See)Contempt, 9.) (Estoppel—By matter of record, 2-3-4-5-10-15-16.) (Evidence—Parol evidence, when admissible or not, 49.) (Evidence—Records of courts; the proof and effect of them, 21-22-23.) (Tenants in common, 3-17-30.)

PARTNERSHIP.

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| I. What constitutes a partnership and its effect upon the partners and others. | II. Of the dissolution of a partnership.
III. Of the sale and purchase of partnership effects. |
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I. WHAT CONSTITUTES A PARTNERSHIP, AND ITS EFFECTS UPON THE PARTNERS AND OTHERS.

1. General reputation is not sufficient to charge a particular person as a partner; there must be some confession of his, or some overt act to prove it. *Hunt v. Jucks*, 1 Hay., 173, (199.)

2. If an assignor and assignee be members of the same firm, and the paper payable to the assignor is expressed on its face to be for a debt due to the firm, a payment to any member of the firm will be a good payment against either the assignor or assignee. *Black v. Bird*, 1 Hay., 273, (315.)

3. One partner may release his interest by endorsement on a partnership note to his co-partner, so as to enable the latter to sue on the note in his own name. *Sneed v. Mitchell*, 1 Hay., 289, (334.)

4. One partner may bind the firm by a bond under seal, signed by himself in the name of himself and his co-partner. *Walker v. Dickerson*, 2 Hay., 23, (178.) Overruled, see *Anonymous*, 2 Hay., 99, (260,) S. C. Tay., 113, (67.)

5. One partner cannot bind another by *deed* or *bond*, unless he either has an express power to do so under seal, or the other be present and assent to the act. But this assent may be implied by circumstances, and, when implied, has the same effect as the most express assent. *Person v. Carter*, 3 Murph., 321.

6. If the partner who has not executed the bond, not only recognizes it as the bond of the firm, but knowingly takes benefit of the effect of the contract, and assents to the extinguishment of a partnership debt by the funds arising therefrom; he

shall also take the burthen, and do the same thing as if he had personally transacted the business. *Ibid.*

7. In an action of assumpsit against a carrier for damage to goods, a dormant partner need not join. *Wilkes v. Clark*, 1 Dev., 178.

8. An agreement between the owner of a vessel and the captain that each party should pay certain expenses and divide the freight, with a power to the captain to invest it on joint account, constitutes a co-partnership. *Cox v. Delano*, 3 Dev., 89.

9. One who receives a portion of the profits, as his property, is a partner; but it is otherwise if the amount of profits is referred to only to ascertain the amount of a debt due him. *Ibid.*

10. On an attachment against one partner for his separate debt, only the separate property of that partner can be seized, the partnership effects cannot be taken. *Jarvis v. Hyer*, 4 Dev., 367.

11. Partners are joint tenants of their debts and merchandize, but the *jus accrescendi* only holds to enable the surviving partner to get in the debts and settle the affairs of the firm. *Ibid.*

12. Where a partner executed a bond for goods sold to the firm, in the name of the firm, and, upon being informed it did not bind his partners, took it back, and with the consent of the obligee removed the seal and re-delivered it with the intent to bind the company, it is effectual as their promissory note. *Horton v. Child*, 4 Dev., 460.

13. The simple contract debt of a partnership is not merged by the several bond of one partner. *Ibid.*

14. If one partner borrow money upon his own credit, and gives his own separate security and obligation for the amount, the other partners will not be responsible for it, although it was applied to the use of the firm. *Willis v. Hill*, 2 Dev. and Bat., 231.

15. A partnership security, taken for the debt of one of the partners, without evidence of the assent of the others, is void at law. *Weed v. Richardson*, 2 Dev. and Bat., 535.

16. A responsibility incurred upon a request made by one *professedly* in behalf of himself and his co-partner, in relation to their common business, but *in truth* for his individual benefit, is, in law, incurred at the request of both. Hence, where a person became surety to a bond, given to secure money borrowed by one partner *professedly* for the firm, and so understood by the lender and the surety, but in truth for the individual use of the borrower, *it was held*, that though the creditor could not recover the money from the firm, for want of authority in the partner to bind the firm by deed, yet the surety upon paying the bond even voluntarily and without suit, might recover the amount from the firm. *Wharton v. Woodburn*, 4 Dev. and Bat. 507.

17. Although one partner cannot bind his co-partner by deed,

for a loan effected in the name of the firm, unless he have express authority by deed for that purpose; yet in equity, if it can be shown that the loan was in behalf of both the partners, and that the security was by the contract intended to be one binding both the partners, but through mistake had been so executed as to bind one only, *it seems* that the creditor may have relief against both. *Ibid.*

18. If one of two partners purchase goods ostensibly for the partnership concern, but in truth for himself, or borrow money for the firm but misapply it, the firm is bound. *Ibid.*

19. An agreement between two persons to carry on a trade upon the terms that one of them is to contribute his labor and the other to furnish all the materials necessary for the business, and to supply the laborer with provisions for himself and his family; and that out of the profits of the business, the materials and provisions are first to be paid for, and then the balance of the profits, if any, to be equally divided between the parties, constitutes them partners, and renders the laborer a necessary party in a suit brought for work and labor done in the cause of the business, although previous to bringing the suit, the parties may have dissolved the partnership, and separated before enough of profits were realized to pay for the materials and provisions; and the laborer may have left indebted to the other for the provisions furnished to his family. *Holt v. Kernodle*, 1 Ired., 199.

20. It is fraudulent to receive from one partner, for his own separate debt, the security of the firm, unless he has authority from the other partner to that effect, or unless the creditor has reasonable and probable cause, from the conduct of the firm, to believe that such authority has been given. *Miller v. Richardson*, 2 Ired., 250.

21. One partner cannot bind his co-partner by a contract, unless it is in some way connected with the partnership business, or unless the act be adopted and recognized by the co-partner, or unless it be a bill or the endorsement of a note, which the party taking it had good reason to believe was authorized by the firm. *Long v. Carter*, 3 Ired., 238.

22. Before one partner, or his representative, can sue another partner at law, the settlement of the firm must be complete and a balance struck. *Graham v. Holt*, 3 Ired., 300.

23. Where a vendor, before he sells to a partner, has notice that there is a partnership, but that each partner is to be liable only for his own purchases, the vendor cannot look to the partnership for payment, but can have recourse only against the partner purchasing. But where the vendor is informed that there is no partnership existing, he may, upon discovering the partnership, make all the partners responsible for goods which he has sold to any one, and which have been carried into the co-partnership concern. *Baxter v. Clark*, 4 Ired., 127.

24. One partner made an advance of \$808 to the firm, and took a memorandum therefor in the shape of a note signed by the other partner and payable to the first. Afterwards the firm was dissolved, and no actual account of the partnership being taken, the partner, who had made this advance, agreed to take a certain amount as his share, and the other partner was to take all the remainder of the effects of the firm, and also "to pay all the debts of the firm." *It was held* that, by this settlement, the partner who made the advance was precluded from claiming the sum advanced as one of "the debts of the firm." *Patterson v. Martin*, 6 Ired., 111.

25. A contract was made with two partners for the keeping of certain horses. Afterwards one of the partners died and the survivor gave his note for the amount due on the contract, which, not being paid, was tendered back to the surviving partner; and *it was held* that the original cause of action was not merged, and that suit might be brought against the representative of the deceased partner to recover damages for the breach of the contract. *Mebane v. Spencer*, 6 Ired., 423.

26. Where a boy was bound by his father as an apprentice to a copartnership, to be taught a mechanical trade, and the father took away the boy before his time had expired, and soon afterwards the copartnership was dissolved, the period of apprenticeship being still unexpired, *it was held* by a majority of the court (RUFFIN, C. J. *dissentiente*) that the persons composing the copartnership could only recover damages for the loss of the boy's services during the time the copartnership continued, and not afterwards. *Hiatt v. Gilmer*, 6 Ired., 450.

27. If one partner purchase goods, ostensibly for the firm, but in truth for himself, the firm is bound in the same manner it would be if the partner had borrowed money for the firm and misapplied it. *Dickson v. Alexander*, 7 Ired., 4.

28. Where two partners entered into a covenant that one of them should receive a salary for managing the business, *it was held* that the salary must be paid out of the partnership funds. *Shaver v. Upton*, 7 Ired., 458.

29. Where a partnership was about to be formed, and one, who was to be a member, purchased a chattel, which was afterwards used by the firm, and agreed by them to be taken from him upon his retiring from the business, and the note he gave for the chattel was, in consequence of this agreement, surrendered to him, *it was held* that the other partners were bound to pay the original seller. *Shaver v. Adams*, 10 Ired., 13.

30. The declaration of a partner, after the purchase of an article, that he had purchased it for and on account of the firm, is not of itself sufficient evidence to make his co-partners liable. *White v. Gibson*, 11 Ired., 283.

31. A promissory note, given by one of the partners of a firm

in the partnership name, binds all the partners, unless the person who takes it knows, or has reason to believe, that the partner who made it was improperly using his authority for his own benefit, to the prejudice of the other partners. *Abpt v. Miller*, 5 Jones, 32.

32. Where a new partner came into a firm, and the same business was carried on at the same place as by the old firm, and one of the members of the new firm gave a promissory note in the name of the new firm, to secure a debt due by the old to one of the workmen, who continued in the employment of the new as he had been in that of the old firm, and which note was regularly entered on the books of the new firm, *it was held*, that the *onus* of proving that the note was given in bad faith, and that the payee knew, or had reason to believe it, rested upon the defendant. *Ibid.*

33. If one partner execute a bond in the name of the firm, and purporting to be the obligation of the firm, it will not bind the firm if the partner had no authority under seal to execute it, nor will it bind the partner who signed and sealed it, because he did not seal and deliver it as his own act and deed. *Sellers v. Streater*, 5 Jones, 261.

34. Where one partner uses the effects of the firm in the payment of his private debt, which is assented to at the time, or subsequently agreed to, by the other partner, it will bind the firm and prevent the recovery by them of the effects thus used. *Carter v. Beeman*, 6 Jones, 44.

35. Where it appeared that each of the partners of a firm was in the habit of using the debts of the firm in satisfaction of his private debts, and entries of such dealings were duly made upon books of the firm, *it was held*, that in an action by the firm for the price of goods thus disposed of, this habitual mode of dealing was proper evidence to repel the existence of fraud in such disposition, and to create a bar to the recovery of such goods. So, the payment of a debt of the firm subsequently created, to the defendant, by the complaining partner, may be received as evidence to disprove fraud in the other partner. *Ibid.*

36. A bond made by one of the partners of a firm, as alleged, for goods sold and delivered to the firm, may, if the sale and delivery be otherwise proved, be evidence of the time of payment, or of the amount, as any other admission of one of the partners would be, but such bond is not proof, *per se*, of the consideration, so as to entitle the plaintiff to recover against the other partner for goods sold and delivered to the firm. *Fronebarger v. Henry*, 6 Jones, 548.

37. Where, upon the face of an instrument, it appeared that one signed, sealed and delivered it, in order to bind the firm of which he was a member, and not as his own individual bond, *it*

was held that it was not his individual bond, even though the firm was not bound by it. *Fisher v. Pender*, 7 Jones, 483.

See (Executors and Administrators—Of their liability to creditors, &c., 108.) (Joint Obligations, 1-6.) (Judgment—Of the effect of a judgment, 27.) (Partition, 12-13.) (Payment, 6.) (Release, 5.) (Retailer of spirituous liquors, 6.) (Set Off, 5-24-27.) (Trespass—Of trespass *quare clausum fregit*, 37.) (Tenants in common, 25.)

II. OF THE DISSOLUTION OF A PARTNERSHIP.

1. The death of a partner dissolves the partnership, and a clerk or agent who had been appointed by the company cannot, after such dissolution, do any act to affect the interest of the company, such as to receive payments, &c. *McNaughton v. Moore*, 1 Hay., 189, (217.)

2. Where a partnership is dissolved and a receiver appointed, a payment of a partnership debt to one of the firm, by a debtor having knowledge of the facts, is void, and the surviving partner may recover the debt. *Manning v. Brickell*, 2 Hay., 133, (301.)

3. The representative of a deceased partner cannot be sued while there is a surviving partner. *Burgwyn v. Hostler*, Tay., 124, (75.) S. C. 2 Hay., 104, (264.) (Altered, see Rev. Code, ch. 31, sec. 85.)

4. Although the admissions of one partner, made after the dissolution of the partnership, may be used to repel the statute of limitation, and the like, yet this is confined to cases where the partnership debt is proved *aliunde*. Such admissions are incompetent to establish the debt originally as one due by the partnership. *Willis v. Hill*, 2 Dev. and Bat., 231. (Such admissions will now repel the statute as against himself only. Rev. Code, ch. 65, sec. 22.)

5. When a co-partnership is dissolved, notice of the dissolution should be given to those who were in the habit of dealing with the firm, and to others, either by advertisement in a public gazette, or otherwise. *Walton v. Tomlin*, 1 Ired., 593.

6. Where one of two partners in a firm retires from it, and assigns all his interest in the store accounts to the other, who afterwards dies, suits to recover the debts must be brought in the name of the surviving partner, and not in that of the personal representative of the deceased one, to whom they had been assigned. *Felton v. Reid*, 7 Jones, 269.

7. Where a partnership has had continuous dealings with a distant correspondent for some time, actual notice of its dissolution must be given to such correspondent, to prevent a liability of all the members of the firm for subsequent dealings carried on by one of the partners in the name of the firm, though without

the knowledge or consent of the other late partners. *Schieffelin v. Stevens*, 1 Winst., 106.

8. Publication of such notice in a local news-paper in this State cannot be regarded as actual notice, or as evidence from which actual notice may be inferred. *Ibid.*

See (Limitations—When the statute will, or will not, bar, 20–54.) (Partnership—What constitutes a partnership, &c., 24–25–26.)

III. OF THE SALE AND PURCHASE OF PARTNERSHIP EFFECTS.

1. The purchaser of partnership effects, under a *fi. fa.* against one co-partner, takes them subject to the accounts of the co-partnership, and can only claim a share of the surplus after the payment of the partnership debts. But the sheriff is not affected by this equity between the purchaser and the other partners. *Tredwell v. Roscoe*, 3 Dev., 50.

2. One partner cannot maintain an action of any kind at law against a person who purchases, from a co-partner, the partnership effects, though such sale was made by the co-partner in fraud of the partnership rights, and to satisfy his own individual debt. *Wells v. Mitchell*, 1 Ired., 484.

3. On a separate judgment against one partner for a partnership debt, only the interest of that partner in any portion of the partnership property can be sold by execution. *Price v. Hunt*, 11 Ired., 42.

4. An officer, who has an execution against one of several partners in trade for the individual debt of the partner, may seize the partnership property and sell the interest of the individual partner therein, without subjecting himself to an action by the other partners for so doing. *McPherson v. Pemberton*, 1 Jones, 378.

5. No action at law of any kind can be maintained against a sheriff for seizing, selling and delivering goods of a partnership to the purchaser, in obedience to a *fi. fa.* against one of the partners. *Vann v. Hussey*, 1 Jones, 381.

6. The purchaser of partnership goods at a sheriff's sale, under an execution against one of two partners, constitutes him a tenant in common of the goods with the other member, and of course with the assignee of the firm. But if such purchaser take all the goods away, and sell them, the assignee may have *assumpsit* for the part of the money arising from the sale to which he is entitled. *Latham v. Simmons*, 3 Jones, 27.

See (Execution—Lien and priority of executions, 44.)

PATROL.

1. When the county court does not form rules and regulations for patrollers, under the act of 1802, and as under that act *one* patroller has not a right to inflict a punishment by himself, and if private persons aid and abet him in doing so, though called upon, they as well as he are all trespassers. *Richardson v. Salter*, N. C. Term, R. 68, (505.) (For the law subsequently see Rev. Code, ch. 83.)

2. Some degree of discretion in the punishment of slaves is necessarily allowed patrols; and if, in the exercise of this discretion, they inflict punishment, they are not liable in an action to the master, unless their conduct clearly demonstrates malice against the owner, such as excessive severity, &c. *Tate v. O'Neal*, 1 Hawks, 418.

3. In the absence of any special regulations by the county court, no act of a patroller in the discharge of his official duties can be valid, unless a majority of the patrollers in the district be present, and a plurality of these sanction the act. *State v. Hailey*, 6 Ired., 11.

4. The office of a patroller is both judicial, or *quasi* judicial, and executive. *Ibid.*

5. Ministers of the Gospel residing in an incorporated town are not exempt from performing the duty of patrol, when required to so by the proper authorities, according to the corporation ordinances. *Elizabeth City v. Kennedy*, Busb., 89.

6. Patrols are not protected by their office when they greatly exceed their authority in beating a slave. *State v. Atkinson*, 6 Jones, 65.

PAWN.

See (Pledge.)

PAYMENT.

1. A creditor may, at his option, apply a payment at law to a bond or account due from his debtor, if the debtor fail to do it. *Hamilton v. Benbury*, 2 Hay., 385, (586.)

2. Where money comes into the hands of a creditor rightfully and by his debtor's consent, for no definite and particular purpose, and the creditor has but one demand, it operates, when sureties are concerned, as a discharge *ipso facto* of the obligation. *Ranner v. McMurray*, 1 Dev., 218.

3. A payment differs from a set off only in this, that a payment is by the consent of parties, either expressed or implied, appropriated to the discharge of a debt. *McDowell v. Tate*, 1 Dev. 249.

4. An account signed by one, acknowledging the receipt of articles from another, whose bond the first holds for a larger amount, should be left to the jury as evidence of a payment on the bond. *Ibid.*

5. Payments made on account of a debt are to be first applied to the interest accrued thereon; and this is a rule where the interest is given by positive enactment, as well as where it is allowed by the jury in their discretion. *Peebles v. Gee*, 1 Dev., 341.

6. Receiving the promissory note of one partner in payment of an open account against a firm, and delivering up the account in writing, does not of itself discharge the original demand. *Wilson v. Jennings*, 4 Dev., 90.

7. Where a dealer with a bank had a balance to his credit upon a general cash account, and died indebted to it by judgment and upon simple contract, the bank has a right, independent of the statute of set off, to apply the balance to the latter debt. *State Bank v. Armstrong*, 4 Dev. 519.

8. Where one is a bailiff or receiver of another, there is, during the continuance of that relation, and until an accounting between them as to their transactions embraced in the account, no legal presumption, as an arbitrary and settled rule of law, that the receiver had paid to the principal all the monies, or any particular sum, before received for him. *State Bank v. Locke*, 4 Dev., 529.

9. If, in the case of a previous debt, the creditor by agreement with the debtor accept the note of a third person, payable to himself, it is presumed to be in satisfaction and extinguishment of the original consideration. Much more, when the seller agrees with the vendee at the time of the sale, to take, and he does then take, for the price, the note of such third person. *Symington v. McLin*, 1 Dev. and Bat., 291.

10. If a debtor have conveyed property to his creditor in trust to sell and satisfy the debt, and the latter sell the property and hold the proceeds, it is a payment of the debt. *Dismukes v. Wright*, 3 Dev. and Bat., 78.

11. A receipt, not under seal, is not conclusive evidence of payment, but may be explained by parol. *Lowe v. Weatherly*, 4 Dev. and Bat., 212.

12. A payment in counterfeit bank notes is a nullity, and the party receiving them, as the price of articles sold, may, if there be no receipt and acquittance under seal, recover upon the original consideration, although both parties were ignorant at the time that the notes were counterfeit. *Ibid.*

13. Where a debtor by note to a bank paid the full amount of the note to the cashier, declaring that the payment was intended to discharge that debt, the cashier was bound to make the application accordingly, and could not apply any part of the sum so paid to the payment of damages on a protested bill, which he alleged to be due to the bank from the debtor. *Runyon v. Latham*, 5 Ired., 551.

14. The act of 1826, making the lapse of ten years a presumption of payment, applies to simple contracts as well as to sealed instruments. *Spruill v. Davenport*, 5 Ired., 663. (See Rev. Code, ch. 65, sec. 18.)

15. To make specific articles a payment, they must be received as a payment, or by a subsequent agreement they must be applied as a payment. *Locke v. Andres*, 7 Ired., 159.

16. When the law is called upon to make the application of payments by a debtor to a creditor, who has various demands against him, and no application has been made by the parties, the application can only embrace debts or demands for certain sums, or such as can be made certain, as accounts for work or labor, or for goods sold or the like, but not uncertain and unliquidated damages. *Ramsour v. Thomas*, 10 Ired., 165.

17. There is another rule in this application by the law, that it is to be first made to the debt for which the security is the most precarious. *Ibid.*

18. The plaintiffs placed in the hands of A a judgment to collect against B, and afterwards A paid the amount of it to the plaintiffs, saying at the same time that he had not recovered any part of the judgment from B, and the plaintiffs told him that he might take and use it as his own; *it was held*, that if this was a payment by A, without the authority of B, it was an officious payment by A, which could not protect B from a suit against him on the judgment; and *it was held further*, that although the statement of A, which was introduced in evidence, was in writing, yet it was proper to leave it to the jury, whether A paid the judgment as agent for B, or whether the transaction was not a purchase of the judgement by A, from the plaintiffs. *Null v. Moore*, 10 Ired., 324.

19. Where a constable, in whose hands a judgment had been placed for collection, received in payment sundry notes of hand, and afterwards paid over the amount in money to the plaintiff in the judgment: *it was held*, that the constable could not afterwards recover, in the name of the plaintiff, the amount of the said judgment from the defendant in the judgment, although he

could show that the notes received from the defendant were on insolvent persons and fraudulently passed to him. *Rogers v. Nutall*, 10 Ired., 347.

20. It is the rule in this State to apply payments to the debt for which the security is most precarious, when no application of the money is made by the party paying. *State v. Thomas*, 11 Ired., 251.

21. Though, by statute, payment of a bond may now be pleaded, and any thing agreed to be received in satisfaction will amount to payment, if the agreement be executed so that the thing becomes at once the property of the obligee, yet it is otherwise of a verbal agreement to deliver *at a future day*, in which case the rule of the common law, *eo ligamine, quo ligatur*, &c., applies. *Rhodes v. Chesson*, Busb., 336.

22. An order for goods, not accepted, is no payment for property sold; and the owner may recover on the common count. *Nissen v. Tucker*, 1 Jones, 176.

23. If a debtor hands money to a third person, who promises to hand it to the creditor, the money does not vest in the creditor so as to make it his, and thereby discharge the debt, until he is notified of the transaction, and agrees to adopt the act of the third person. *Strayhorn v. Webb*, 2 Jones, 199.

24. Where it was agreed between the president of a plank road company and a subscriber to the stock, that the latter might pay for his subscription, which had been previously made, in work to be done on the road, the company furnishing the materials wherewith the work was to be done, which they failed to do, in consequence of which the defendant also failed to do the work, *it was held* that there was neither a payment nor an accord and satisfaction shown by the defendant, and that the company was entitled to recover. *Salisbury and Taylorsville Plank Road Company v. Allison*, 5 Jones, 311.

25. Where a person sold property and took a note for the price, and there was a lien upon the property at the time of the sale, and the purchaser paid off the amount of such lien, *it was held* that the law presumed the payment to have been made at the request of the vendor, and that it was, therefore, in effect a payment of the note held by him. *Crowell v. Simpson*, 7 Jones, 285.

See (Agent and Principal—Factors, 1–2.) (Bonds—Payment or satisfaction of bonds.) (Executors and Administrators—Letters testamentary and letters of administrators, 36.) (Executors and Administrators—Of sales by executors and administrators, 9–17 20.) (Husband and Wife—Husband's interest in his wife's estate, &c., 15–16.) (Judgment—Of the satisfaction of judgments.) (Usury—Of the action for the penalty, 15.)

PENAL STATUTES.

1. No penal statute can be construed by implication, or otherwise than by the express letter. *State v. Knight*, 2 Hay., 109, (267,) S. C. Tay., 65, (44.)

2. The repeal of an act giving a forfeiture for an offence is a repeal for all forfeitures incurred under the act repealed, unless there be a special exception to the contrary. And if an act be repealed, pending a suit for a forfeiture under it, the repeal may still be pleaded in bar. *Governor v. Howard*, 1 Murph., 465.

3. Penal statutes are to be construed strictly. The act which imposed a forfeiture upon any justice *accepting* the office of deputy clerk, and upon any deputy clerk *accepting* the office of justice of the peace, *held* not to apply to a person who was both deputy clerk and justice before the passage of the act, and who continued to act in both capacities afterwards. *Wardens of Granville v. Sneed*, 1 Murph., 485. (See Rev. Code, ch. 62, sec. 5.)

4. In a penal statute the word "or" shall never be construed "and," so as to make it more penal. *State v. Kearney*, 1 Hawks, 53.

5. In an action on a penal statute, it is necessary in the declaration or warrant to name the statute, or recite its provisions, or refer to it in some way, as by the general terms, "contrary to the statute in such case made and provided," so as to give the party notice of the law, with the violation of which he is charged. *Scroter v. Harrington*, 1 Hawks, 192. S. P., *Worke v. Byers*, 3 Hawks, 228. *Buncombe Turnpike Company v. McCarson*, 1 Dev. and Bat., 306.

6. The certificate of the justice required by the act of 1796, "to punish persons for removing debtors," &c., was intended solely for the benefit of the person who removed the debtor, it was only *one mode of proof* that the debtor had duly advertised; *held*, therefore, that it might have been obtained at any time either before, or after the removal, and might have been dispensed with altogether, if the party could make the same proof by other testimony. *Mann v. McVay*, 1 Hawks, 226. (The law on this subject is altered. See Rev. Code, ch. 50, sec. 14.)

7. Where a judgment is recovered in the name of the wardens of the poor, by a relator, for a penalty, to one half of which he is by law entitled, he may release one half of the judgment, that being his own share, but he cannot release the other half, which belongs to the wardens. *Wardens of the Poor v. Cope*, 2 Ired., 44.

8. The overseer of a road may recover in his own name the penalty for hands not working on the public road. He is not bound nor required to sue "for himself and the county," since the fine is to be applied by the overseer to the keeping up of the

road. *Duffey v. Averitt*, 5 Ired., 455. (See Rev. Code, ch. 101, sec. 9.)

9. Judgment on a warrant, by an overseer of a road, for \$30 for thirty hands not working on a public road, when the jury find only \$28, will not be arrested. As there are no declarations on a warrant, the court will intend that there were thirty counts for \$1 each per hand, and then there may be judgment on the twenty-eight counts proved, and not on the other two. *Ibid.*

10. In an action upon a statute to recover a penalty, the plaintiff must set forth, in his declaration, every fact which is necessary to inform the court that his case is within the statute. *Wright v. Wheeler*, 8 Ired., 184.

11. Penal statutes cannot be extended by equitable construction beyond the plain import of their language. *Smithwick v. Williams*, 8 Ired., 268.

12. When a covenant action is brought for a penalty, and the recovery in it is pleaded to a subsequent *bona fide* action for the same penalty, the plaintiff in the second action may reply that the judgment in the first was covenant. *Burnett v. Davidson*, 10 Ired., 94.

13. Under the statute prohibiting the sale of liquor to a slave, which gives a penalty of \$100 against the offender, and declares that it shall "be recovered by warrant before any justice of the peace, and applied one half to the use of the person suing for the same, and the other half to the use of the poor of the county," any person may sue *qui tam* for the penalty as informer. *McRae v. Keller*, 10 Ired., 398. (The offence of unlawful selling to slaves subsequently only indictable as a misdemeanor. See Rev. Code, ch. 34, secs. 83-84-85-86-87-88 and 89.)

14. A common informer cannot recover a penalty unless he sue within the period allowed by the act imposing the penalty. As where a penalty was imposed on persons fishing in the Roanoke river at certain times, and any person might sue for the same, provided he did so within one month from the forfeiture, and if no suit was brought within that period, the law officer of the State was directed to sue for the use of the State, (act of 1827, ch. 54,) it was held that, after the expiration of the month, the right of the common informer was gone. *Fagan v. Armistead*, 11 Ired., 433.

15. A warrant for a penalty, incurred by violating an ordinance of a town, must set forth the act of assembly by virtue of which the ordinance was passed, and an omission to do so will furnish a ground for an arrest of the judgment. *Commissioners of Washington v. Frank*, 1 Jones, 436.

16. The action for the penalty for fornication under the act, Rev. Stat., ch. 119, sec. 7, must be brought within ten days after the commission of the offence. *Curtis v. Miller*, 1 Jones, 553.

(The section in question is omitted in the Rev. Code. See ch. 115.)

17. The action against a guardian for the penalty of \$200, given by the Rev. Code, ch. 54, sec. 26, in connection with ch. 46, sec. 20, for hiring the property of his ward privately, is not to be brought in the name of the State, but is properly brought in the name of the person who may sue for the same. *Norman v. Dunbar*, 8 Jones, 317. (See Rev. Code, chs. 47 and 48.)

See (Debt—Of the verdict in the action of debt, 4-5.) (Husband Wife—Marriage, 17.) (Justices of the Peace—Of justices' warrants in civil cases, 5-7-11-13.) (Justices of the Peace—Of justices' warrants in criminal proceedings, 10-11.) (Abatement—By the death of parties, 2-4-12-13.) (Pleading—Of the writ and declaration, 6-7-24-26-27-29.)

PENSION.

1. Where the plaintiff declared against the defendant for a breach of the following agreement: "R. H. M. has promised to procure for my mother a pension from the government of the U. S., supposed to be due her as the widow of Lieut. C. G., and in the event of his doing so, I promise and oblige myself to give the said R. H. M. one-half the money due her on account of the said pension;" *It was held* that this agreement referred to a pension to which the widow was then entitled, or supposed to be entitled, and not to a pension to which she became entitled under an act of Congress subsequently passed; and further, that although the sales of pensions are by law prohibited, yet the court could not infer from this agreement, (though a jury might,) that it was made by the son as the agent of his mother, and, therefore, it did not transfer any title to any portion of the pension, and was not, on that account, invalid. And *it was held*, also, that upon a count for work and labor A could not recover from B, because his services did not enure to the benefit of B, and, therefore, the law would not imply a promise. *Mosby v. Hunter*, 9 Ired., 119.

2. An agreement between the widow of a soldier of the revolution, entitled to a pension under the act of Congress of 1848, ch. 120, and an agent, that the latter should receive a certain part of the pension money for his services in obtaining it, is void, and money received by the agent under such an agreement may be recovered by the pensioner in an action of assumpsit. *Powell v. Jennings*, 3 Jones, 547.

3. Where a sub-agent receive from the general government a pension, under an agreement with the pensioner, that one-half of the amount was to be paid to the principal agent at Washing-

ton City, and, before any objection or demand on the part of the pensioner, one-half was paid to his principal by the sub-agent, *it was held*, that the amount thus paid could not be recovered by the pensioner in a suit against the sub-agent. *Bridgers v. McNeil*, 6 Jones, 311.

PERJURY.

1. The indictment charged that the defendant swore, "that one G. did not interrupt a constable in driving certain cattle to G.'s house," the evidence was that the defendant swore "that G. did not assist in driving the cattle from the officer;" *held* that the evidence did not support the charge. *State v. Bradley*, 1 Hay., 403, (464) and 463, (533.)

2. In order to constitute perjury, the oath must be taken in some judicial proceeding, and before some person authorized to administer the oath which is taken. A mere voluntary oath cannot amount to perjury. *State v. Wyatt*, 2 Hay., 56, (219.)

3. It is not necessary, in an indictment for perjury, to state that the person holding the court, before which the false oath was taken, is a judge of the superior court; such statement being expressly dispensed with by the latter part of the 3rd section of the act of 1791. *State v. Bryson*, 1 Car. L. R. 503, (115.) (See Rev. Code, ch. 35, sec. 16.)

4. Perjury may be committed in answering a question that has no direct relation to the issue, if asked with a design to impair the credit of the witness as to those parts of the case which were material to the issue, particularly if the witness be cautioned as to his answer. *State v. Street*, 1 Murph., 124.

5. In an indictment for perjury, the style of the court, before which the perjury is alleged to have been committed, must be legally set forth. *State v. Street*, 1 Murph., 156.

6. If an indictment for perjury charge it to have been committed at certain court, in an *issue joined* in a certain cause which came on there to be tried, it cannot be supported if the record produced shows that *no issue was joined*. *State v. Ammonds*, 3 Murph., 123.

7. In an indictment for perjury, it is necessary to set forth that the oath was taken in some judicial proceeding before a competent tribunal, and upon a point material to the issue depending; and by the common law it was necessary to set forth the record of the cause, wherein the alleged perjury is charged to have been committed, to prove on the trial that there is such a record by producing it, or a certified copy of it, and when pro-

duced, it must agree with that set forth in the indictment, without a material variation. *Ibid.*

8. Since the act of 1791, it is not necessary to set forth the record of the cause in the indictment, but if it be recited, the recital must be correct, or the prosecution must fail. *Ibid.* (See Rev. Code, ch. 35, sec. 16.)

9. An indictment for perjury, on a trial in court, is proper which states that the oath was taken before the court, and that the testimony was thereupon given to the jury; and it will be sufficient, if it states that a certain person held the court in the county of R., the said county being also mentioned in the caption, and afterwards alleges that the oath was "then and there" taken, for those words refer to the county and time before mentioned. *State v. Witherow*, 3 Murph., 153.

10. An indictment, which charged that the defendant falsely, &c., swore to certain facts before the grand jury, but did not charge how, or in what way, the facts sworn to agreed with the allegations in the indictment, nor that they were material to or connected with the question then under consideration, cannot be sustained. *State v. Dodd*, 3 Murph., 226.

11. When a witness comes forward and is sworn with uplifted hands, he may be convicted of perjury, though he was not conscientiously scrupulous about being sworn on the Holy Gospel. *State v. Whisenhurst*, 2 Hawks, 458.

12. Perjury may be committed in swearing falsely to a collateral matter, with intent to prop the testimony on some other point, but such collateral matter must be material to the point in dispute; for if it be to a point, the existence or non-existence of which cannot affect the question in dispute, it does not tend to prevent the due administration of justice, and therefore is not perjury. *Studdard v. Linville*, 3 Hawks, 474.

13. Perjury cannot be committed by taking a false oath in a case before a justice of the peace, of which he has no jurisdiction. *State v. Alexander*, 4 Hawks, 182.

14. Perjury is properly assigned in an oath taken before a court of competent jurisdiction, although the witness was irregularly sworn. *State v. Molier*, 1 Dev., 263.

15. In an indictment for perjury, it is sufficient to charge generally that the false oath was material to the trial of the issue upon which it was taken; and it is not necessary to show particularly how it was necessary. *State v. Mumford*, 1 Dev., 519.

16. A general averment falsifying the testimony given is not sufficient; every fact falsely deposed to must be distinctly negatived. *Ibid.*

17. An indictment for perjury, which sets forth that a warrant was tried in which A demanded of B twenty dollars for corn, &c., is sufficiently proved by producing a warrant between those

parties "for debt due by account," without specifying the particulars of the account. *State v. Alexander*, 2 Dev., 470.

18. An indictment for perjury charging that the defendant "being a wicked and evil person, and unlawfully and unjustly contriving, &c., deposed," &c., and concluding that the defendant "of his wicked and corrupt mind, did commit willful and corrupt perjury," is defective even at common law, for not alleging that the defendant *willfully and corruptly* swore falsely.—*State v. Carland*, 3 Dev., 114.

19. Where the defendant is indicted for a perjury, committed on the trial of an issue in a former indictment, the bill must set forth the finding of the former indictment in the proper court of the proper county, and should also set forth that indictment, or so much of it as to show that it charged an offence committed in that county, and of which said court had cognizance, and also the traverse or plea of the defendant in that indictment, whereon the issue was joined; and a judgment, on an indictment defective in these particulars, must be arrested. *State v. Gallimore*, 2 Ired., 372. (For what is now necessary to be set forth in such an indictment, see Rev. Code, ch. 35, sec. 16.)

20. The act of 1791 was repealed by the Revised Statutes of 1836, and the act of 1811 does not cure such defects, for they are neither informalities nor refinements within the meaning of that statute. *Ibid.* (See Rev. Code, ch. 35, sec. 14.) (The act of 1791 was substantially restored by that of 1842, ch. 49. See Rev. Code, ch. 35, sec. 16.)

21. In an indictment for perjury, it is not necessary to set forth the pleadings in the former case, in which the perjury is alleged to have been committed; the act of 1842 having altered the common law in that respect. *State v. Hoyle*, 6 Ired., 1.

22. There is but one statute in this state punishing the crime of perjury, Rev. Stat., ch. 34, secs. 50 and 52, and, therefore, an indictment for that crime, which concludes against the form of the statute, is right. *Ibid.* (See Rev. Code, ch. 34, secs. 49 and 51.)

23. When the perjury, on which an indictment is founded, is alleged to have been committed on the trial of a cause at a special term of the superior court, it is not necessary to set forth in the indictment the order of the judge directing such special term to be held, nor the appointment by the governor of the particular judge who is to hold it. Nor is it necessary to prove either of those facts on the trial. *State v. Ledford*, 6 Ired., 5.

24. An indictment for perjury must set out the substance and effect of the testimony in which the perjury is assigned. *State v. Groves*, Busb., 402.

25. Where an indictment charged the defendant with having sworn that A purchased a gun of B, and his testimony, as proved on the trial, was that B, in a conversation with A, asked him if

he had brought home his gun, to which A replied "he had forgot it," and said, "I will keep the gun and allow \$15 for it on what you owe me," to which B replied "enough said," *it was held* that the proof did not support the charge; for B's answer did not necessarily import an assent to the proposal of A, but was susceptible, under the circumstances, of another interpretation. *Ibid.*

See (Indictment—In what case an indictment will lie, 2.) (Indictment—Form and matters relating thereto, 3-22.) (Indictment—Of the trial, verdict and judgment, 15.) (Indictment—Plea of former acquittal or conviction, 2.) (Evidence—In criminal proceedings and indictments, 7-18-31-79.)

PILOTS.

1. According to the several acts of Assembly upon the subject of "pilots," where a pilot tenders his services to a vessel of over one hundred and twenty tons burden, bound in over the bar at Ocracocke, before she gets to the bar, the commander is bound to pay the usual rates of pilotage, though he refuses to receive such pilot on board his vessel, and though the weather was fair, and though it was in the month of August, and though the defendant was fully competent to bring in his vessel with safety. *Gerrish v. Johnson*, 1 Jones, 335. (See Rev. Code, ch. 85, sec. 34, and following.)

PLEADING.

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|---|---|
| I. Of the joinder of parties. | VII. Of demurring of the parol. |
| II. Of the joinder of actions. | VIII. What defects may be cured by pleading over. |
| III. Of the writ and declaration. | IX. Of <i>scire facias</i> and the pleadings thereon. |
| IV. Of pleas, replications and demurrers. | X. Of the verdict and judgment. |
| V. Of replender. | XI. Of writs of error. |
| VI. Of a variance between the allegation and proof. | |

I. OF THE JOINDER OF PARTIES.

1. In actions of contract, the parties must all join in the action, or advantage may be taken of the non-joinder on the general

issue; but in actions of *tort*, the non-joinder must be pleaded in abatement. *Weare v. Burge*, 10 Ired., 169, S. P. *Richardson v. Jones*, 1 Ired., 296.

2. Tenants in common may, in general, sue separately for trespasses on real estate, yet they may also join in such action, in respect to the injury being to their joint possession. *Camp v. Holmesley*, 11 Ired., 211.

3. Where one joint owner of a slave, having him in his possession, agreed to take off his handcuffs upon the request of another, upon his agreeing to pay him \$100 in case the slave should escape, *it was held* that the other joint owner was not a necessary party to a suit to recover the money for the escape of the slave. *Weatherly v. Miller*, 2 Jones, 166.

4. One of two joint purchasers cannot, in an action for a deceit in the sale of the property to them, release or assign his interest to the other, so as to enable him to sue alone. *Scott v. Brown*, 3 Jones, 541.

5. In actions of *tort* arising *ex contractu*, a non-joinder of a party plaintiff may be taken advantage of on the trial upon the plea of the general issue, or by a motion in arrest of judgment, or by writ of error. *Ibid.*

6. In an action on the case, by two joint owners of a vessel against a captain for negligence and delay in making a voyage, *it was held* that, upon the death of one of them, the right of action survived to the other, and that it was a misjoinder to bring in the executor of the deceased joint owner. And, *it was held further*, that, as the misjoinder appeared on the record, the proper mode of taking advantage of it was by demurrer, motion in arrest, or writ of error, and not by a motion for a *non-suit* on the trial. *Bond v. Hilton*, 6 Jones, 180.

7. The allegation of a contract made with five persons, who are plaintiffs, is not supported by proof of a contract made with three, and the variance is a ground for nonsuit at the trial, on the general issue. *Murray v. Davis*, 6 Jones, 341.

8. Though a covenant be with two or more jointly, yet if the interest and cause of action of the covenantees be several, the covenant shall be taken to be several, and each of the covenantes may bring an action for his particular damage, notwithstanding that the words of the covenant are joint. *Little v. Hobbs*, 8 Jones, 179.

See (Abatement—Plea in abatement for what causes to be put in, 6.) (Husband and Wife—Of suits by and against husband and wife, 2-3-4-5-10-11-12-13-15-16-17.) (Joint Obligations.)

II. OF THE JOINDER OF ACTIONS.

1. In an action on the case, a count in deceit for knowingly

misrepresenting the soundness of a chattel, may be joined with a count for a breach of the warranty of the soundness of the same chattel. *Lassiter v. Ward*, 11 Fred., 443.

2. A count for trespass *vi et armis* to slaves may be joined with trespass *quare clausum fregit*, in the same declaration. *McClees v. Sikes*, 1 Jones, 310.

3. A count in trespass for willfully killing a horse may be joined with trespass *quare clausum fregit* in entering upon the plaintiff's land; and where no formal declaration is filed, such additional count will be understood as having been inserted. *Rippey v. Miller*, 1 Jones, 479.

4. A count in *case* for a deceit in a sale of goods cannot be joined with one in *assumpsit* on a warranty of soundness. *Chamberlain v. Robertson*, 7 Jones, 12.

See (Pleading—Of the writ and declaration, 4-9-28.)

III. OF THE WRIT AND DECLARATION.

1. A writ in debt, "that they answer unto him of a plea of debt of 1000 dollars," held good on a demurrer to a plea in abatement, that the writ did not run in the *debet and detinet*. *Guion v. McCullough*, 2 Mar., 78, (132.)

2. In slander, words spoken after the time laid in the declaration will not support it. *Quære* by Haywood. *Witherspoon v. Isbell*, 1 Hay., 12, (17.)

3. Where a special contract is sued on, it should be set forth precisely as it is; any variance between it as set forth and the proof will be fatal. *Anonymous*, 1 Hay., 488, (562.)

4. A count upon the promise of the intestate may be joined with one upon the promise of the administrator to pay the debt of the intestate. *Wilkins v. Murphy*, 2 Hay., 282, (460,) S. P. *Gregory v. Hooker*, 1 Hawks, 394.

5. On an appeal from the county to the superior court, the plaintiff shall not change the declaration filed in the county court, and if there were no written declaration he shall be confined to the grounds of action declared on in the court below. *Davis v. Gibson*, Conf. Rep., 102, (233.)

6. In penal actions the charge must be made with precision, and therefore where the declaration only alleged by way of recital, as "that whereas the said defendant having, &c.," it was held bad. *Harrington v. McFarland*, Conf. Rep., 408., (476.)

7. A writ in debt on a penal statute, which called on the defendant "to render to the plaintiff the sum of £50 due under an act of the general assembly to him, and which from him he unjustly detains, &c.," is substantially in *debet and detinet*. *Page v. Farmer*, 2 Murph., 288, S. C. 1 Car. L. R., 278, (29.)

8. Where one count in a declaration for a libel charged, "that the defendants combined and contrived to cause it to be believed

that the plaintiff was a sot and a common drunkard," and a second count charged "that the defendants further contriving and intending as aforesaid," composed, &c., the libel, &c., and a verdict was found for the plaintiff on the second count only, *it was held* that the words "further contriving and intending as aforesaid" referred to the allegations contained in the introductory part of the first count, as to the intent of the libel, and was sufficient without repeating the allegation as to such intent. *Frazier v. Felton*, 1 Hawks, 231.

9. A count against an executor, charging him upon his promise as such, may be joined with a count upon a promise of his testator. *Gregory v. Hooker*, 1 Hawks, 394.

10. It is necessary for a plaintiff to state in his declaration, not only that he has sustained damage, but also *how* he has been damaged. *Gardiner v. Sherrod*, 2 Hawks, 173.

11. A variance between the writ and declaration, the former being in debt and the latter in assumpsit, is fatal even after verdict. *Stamps v. Graves*, 4 Hawks, 102.

12. A declaration for a libel must undertake to set out the very words; to give the substance and effect is not sufficient, and, if on the trial the libel produced does not correspond with that set out, the plaintiff must fail, since no reason can be assigned why he should not be required to prove what he is required to allege. *Whitaker v. Freeman*, 1 Dev., 271.

13. After the defendant has pleaded to the warrant, so as to meet the case made by it, the plaintiff cannot, upon an appeal, declare in such a manner as to make the plea ineffectual. *Downey v. Young*, 1 Dev., 432.

14. Where a writ was to answer "A, guardian of B," the words "guardian of B" were *held* to be but matter of description, and the suit to be the suit of A, and not of the ward; and evidence of the ward's title was therefore irrelevant. *Dowd v. Wadsworth*, 2 Dev., 130.

15. In England no advantage can be taken of a variance between the original writ and the declaration, except upon *oyer* of the writ, because the writ issues from another court, and does not become part of the record until *oyer* be had of it. But here the writ, being issued from and returned to the same court, is part of the record without *oyer*; hence a variance between the writ and declaration is fatal even after verdict. *Glisson v. Herring*, 2 Dev., 156. (Overruled, see *West v. Rattledge*, 4 Dev., 31.)

16. The failure to serve the defendant with a copy of the declaration filed in the county court, five days before the first day of the term, can only be taken advantage of by plea in abatement, and not by a mere motion to dismiss. *Laverty v. Turner*, 4 Dev., 275.

17. A count in a declaration for a malicious and excessive levy and sale by a constable, which states a seizure and sale by the officer of "the property," to a greater value than the debt

to be satisfied, is insufficient; for "the property" may be either real or personal; if the former, then the plaintiff sustained no injury by the acts of the defendant, because neither the levy nor sale by a constable can divest the owner of land of his title or disturb his possession; if the latter, then there is no averment that it was not an entire thing, or that there were, at the time of the levy, other goods or chattels of the plaintiff, known to the defendant, in such different or distinct parcels or kinds, that the defendant might have taken a reasonable part thereof, and not the thing which he did take, and which was of greater value than the sums to be raised. *Honeycut v. Angel*, 4 Dev. and Bat., 306.

18. In a declaration against a constable for a fraudulent levy upon the lands of the plaintiff, and a return of the same to court, whereby an order of sale was obtained, and the land sold by the sheriff, it is necessary to state an eviction of the plaintiff, or some disturbance by the defendant, or by some person deriving title under the sheriff's sale and conveyance; and the allegation that the sheriff "made title to the purchaser," without stating that some person in particular, claiming and getting title by virtue of the sheriff's deed, turned or kept the plaintiff out of possession, is insufficient. *Ibid.*

19. Where a bond was made payable to A "as executor," with a condition that the obligor would pay a certain sum for the lease of lands belonging to the estate of A's testator, and to return the premises in good repair, *it was held* that the writ and declaration might be in the name of A without describing him as "executor," that word being mere surplusage. *Waddell v. Moore*, 2 Ired., 261.

20. Where claims put into a constable's hands for collection belong to a copartnership, all the members of the firm, being in law the "persons injured," must be relators in an action for a breach of the constable's bond in not collecting such claims, notwithstanding any private arrangement among the partners, as to the beneficial interest in the proceeds of the claims. *State v. Lightfoot*, 2 Ired., 306.

21. Where a debt is due to A, and he places it in the hands of a constable for collection, he is the only person who can maintain as relator an action on the official bond of the constable for breach of duty, notwithstanding he may have afterwards assigned his interest in the debt to another person. *State v. Deaver*, 3 Ired., 56.

22. In a declaration for slander in charging the plaintiff with perjury, where it is alleged that the plaintiff had been in a certain suit sworn and examined on oath as a witness, &c., it is not necessary to state what he testified on such trial. At all events, such objection comes too late after verdict. *Whitaker v. Carter*, 4 Ired., 461.

23. In an action on the case in the nature of a conspiracy, charging that the defendants combined to injure the plaintiff's credit, it is necessary for the plaintiff to aver in his declaration the means by which such injury was intended to be effected. *Setzar v. Wilson*, 4 Ired., 501.

24. A declaration against a minister of the gospel, or a justice, under the act of 1778, for a penalty in marrying persons who had not complied with the requirements of the act, must state not only that they were married without a license, but also that no certificate of the publication of banns was produced to the minister or justice; and a mere averment, that there was no license and that there had been no publication of banns, is not sufficient to support the declaration. *Drake v. McMinn*, 5 Ired., 639. (See Rev. Code, ch. 68, secs. 1, 2, 3 and 6.)

25. Where a plaintiff, having two judgments against the same defendant, brought his action against the sheriff for an escape and declared on both the judgments, *it was held* that, though he could not recover on one, he might on the other judgment. *Lash v. Ziglar*, 5 Ired., 702.

26. Where an action is brought for a penalty imposed by a statute, or actions are brought founded on rights created by a statute, and for which there was no action at common law, the declaration, like an indictment, must be framed on the statute or statutes, stating not only the circumstances necessary to bring the case within the meaning of the act, but also expressly counting on it. *McKay v. Woodle*, 6 Ired., 352.

27. This rule does not embrace the case where a statute is simply remedial, giving an easier or cumulative remedy for a wrong, for which there was a remedy at common law; therefore, in an action for worrying, maiming and killing the hogs of the plaintiff, while trespassing on the enclosed ground of the defendant, the same not having a sufficient fence according to the act of 1831, it is not a sufficient objection, that the declaration does not refer to the statute, for the plaintiff had a remedy at the common law. *Ibid.* (See Rev. Code, ch. 48, sec. 3.)

28. A count for a forcible entry may be joined with one for an assault and battery, in the same declaration. *Flinn v. Anders*, 9 Ired., 328.

29. A declaration, commencing and concluding in *case*, but in the body of it setting forth a *debt* under a penal statute, seems to be sufficient without a demand for *damages*. But whether so or not, according to the strict rules of pleading, a defect in this particular is cured by the act of amendments, Rev. Stat., ch. 3, sec. 5. *Brooks v. King*, 1 Jones, 45. (See Rev. Code, ch. 3, sec. 5.)

30. A plaintiff, commencing by a warrant, may, when the case is taken to a higher court, file a declaration, setting forth his cause of action more distinctly than it is set forth in his warrant,

taking care to make no departure from it. *Gerrish v. Johnson*, 1 Jones, 335.

31. The plaintiff, according to the ordinary practice among the members of the bar, is entitled to the benefit of being considered as having filed his declaration, according to the facts as set forth in a case agreed. *Ibid*.

32. According to the general understanding of the profession, when a plaintiff is not required to file a formal declaration the court is to assume that his declaration contains all the averments necessary to sustain his case. *Jones v. Jones*, 1 Jones, 495.

33. In a declaration for a deceit in the sale of a fishery, the price paid for the property is not a material constituent of the cause of action, and need not be proved as alleged. *Pettijohn v. Williams*, 2 Jones, 33.

34. One justice of a county cannot make a contract with his associate justices in the official character, so as to enable them to sustain a suit as "justices" of the county. *Justices of Tyrrel v. Simmons*, 3 Jones, 187.

35. *It seems* that in the case just above stated, the contract might have been alleged to have been made with the county as a corporation, so as to have sustained a suit in the name of the county. *Ibid*.

36. Where a constable, to relieve himself from liability for failing to collect a judgment in his hands, paid it off to the plaintiff therein, and then put it into the hands of another constable to be collected for himself, *it was held* that, as there was some evidence that the former constable had purchased the claim, he might properly be the relator in a suit on the bond of the defendant for having failed to collect the money. *Garrow v Maxwell*, 6 Jones, 529.

37. According to the general understanding of the profession, where parties have gone to trial without a formal declaration, the plaintiff is to be taken to have relied on one suited to the case made by the proof. *Davis v. Goldston*, 8 Jones, 28.

See (Bills of Exchange and Promissory Notes—Remedy on a bill or note, Declaration, Pleadings and Evidence.) (Contract—Construction of contracts and where an action will lie, 35.) (Evidence—Parol evidence, when admissible.) (Executors and Administrators—Of suits by executors and administrators, 1-3-25-26-27.) (Mandamus and quo warranto, 7-8.) (Penal statutes, 7-10-15.) (Pleading—Of pleas, replications and demurrers, 42.) (Process, 1-2-3-5-6-7-8-9-10-11.) (Sheriff—Of the liability of sheriffs and their sureties, 30.)

IV. OF PLEAS, REPLICATIONS AND DEMURRERS.

1. In an action of trespass *quare clausum fregit*, the defendant

may, under the plea of the general issue, give in evidence a license. *Cox v. Dove*, Mar., 43, (35.)

2. A plea since the last continuance is a waiver of all former pleas, and an admission of the declaration. *Greer v. Sheppard*, 1 Hay., 96, (111,) S. P. *McDaniel v. Tate*, *Ibid*, 452, (520.) (This rule is altered. Rev. Code, ch. 31, sec. 57, rule, 12.)

3. If, pending a suit against administrators, their letters be repealed, they must plead *ipais darrein continuance* at the first term thereafter, else it will be too late. *Bailey v. Cockran*, 1 Hay., 104, (120.)

4. A plea to the jurisdiction of the court under the act of 1793, (Rev. Code, ch. 31, sec. 37,) is to be decided, as to the amount for which the suit is brought, only by the writ and declaration. *Allen v. Stokes*, 1 Hay., 122, (142,) S. P. *McNaughton v. Hunter*, *Ibid*, 454, (522.)

5. In an action of covenant, on the plea of "covenants performed," the defendant cannot be permitted to say that there is no such covenant as that set forth in the declaration. *Anonymous*, 1 Hay., 144, (166.)

6. If, in such case, the jury find a verdict upon matters not submitted to them in the issues, it will be void as to such matters, while it may be good as to the issue to which it is responsive. *Ibid*.

7. The court must be satisfied of the probable truth of a plea since the last continuance, before they will permit it to be put in. *McNaughton v. Naylor*, 1 Hay., 180, (207.)

8. A plea, subsequent to the term at which a former one was put in, is not necessarily a plea since the last continuance. It may have been added by permission or by consent, as an original plea. *Peale v. Folsome*, 1 Hay., 181, (208.)

9. A general demurrer to a plea admits the fact pleaded, but denies its sufficiency in law; a special demurrer does not admit the fact pleaded, but setting forth specially any informality or defect in the plea, refers it to the court to decide on such informality or defect. *Davison v. Mull*, 1 Hay., 364, (417.)

10. An account against the plaintiff cannot be given in evidence under the plea of payment. *Evans v. Norris*, 1 Hay., 411, (473.)

11. A demurrer to a plea in abatement for want of an affidavit is improper; the proper course is to move the court not to allow the plea to be received. *Corse v. Ledbetter*, 2 Hay., 15, (164.)

12. Where there is a demurrer to a plea, though the court is about to overrule it, it may permit it to be withdrawn and a replication entered. *Keais v. Shepard*, 2 Hay., 218, (390.)

13. Where plaintiff sued in his surname only, and there was a plea in abatement, that his christian name was not inserted, a replication, that the plaintiff was as well known by his title of

courtesy as by his christian name, was held bad. *Labat v. Ellis*, Tay., 148, (92.)

14. To a plea of the statute of limitations to debt on a bond by a British subject, a replication of the treaty of peace of 1783 is bad. *Miller v. Gordon*, Tay., 300, (130.)

15. Every plea has reference to the commencement of the action, or at least to the time of the process served. *Smoot v. Wright*, Conf. Rep., 374, (449.)

16. To an action of debt on the judgment of a court of record in another state, *nil debet* is a bad plea; it should be *nil tiel record*. *Wade v. Wade*, Conf. Rep., 486, (538,) S. P., *Carter v. Wilson*, 1 Dev. and Bat., 362, *Knight v. Wall*, 2 Dev. and Bat., 125.

17. The statute of limitations may be pleaded after issue joined under peculiar circumstances, on payment of full cost. *Reed v. Hester*, Conf. Rep., 488, (540.) S. P., *Johnston v. Williams*, *Ibid*, 518, (565.) *Hamilton v. Shepard*, 2 C. L. Rep. 471, (357.)

18. To the plea of set off there may be a double replication. *Holding v. Smith*, 1 Murph., 154.

19. To debt on a bond, the plea of "illegal consideration" is bad, as being too general to give notice of the particular illegal consideration intended to be relied on as a defence. *Boyt v. Cooper*, 2 Murph., 286, S. C., 1 Car., L. R., 277, (28.)

20. A plea of alien enemy, entered at a term subsequent to that at which the original pleas were entered, is not a good plea in bar of the action generally, but only in bar of the further maintenance of the suit, and being a plea since the last continuance, shall not, since the act of 1796, amount to a relinquishment of former pleas. *Teare v. White*, 2 Car., L. R., 112, (210,) (See Rev. Code, ch. 31, sec. 57, Rule 12.)

21. In an action on a contract, whenever it appears in the pleadings that there are other parties who ought to be plaintiffs, it may be demurred to, or taken advantage of by motion in arrest of judgment or on a writ of error; but if the objection do not so appear, and is shown in evidence, it will be proper cause for a non-suit on the general issue. *Wilcox v. Hawkins*, 3 Hawks, 84.

22. It is a matter of discretion with the judge to permit a special plea to be added after the jury is empanelled. *Hamilton v. Wright*, 4 Hawks, 283.

23. The word "set off," entered by the defendant with the general issue, shall be taken as a plea in bar, where the amount is equal to or greater than the plaintiff's demand; but where it is less, it shall be taken as a notice of set off only. In the former case, the plaintiff must specially reply the statute of limitations if he wish to take advantage of it; in the latter case, a replication is neither necessary nor proper, but in both cases the particu-

lars of the set off must be furnished if required. *McDowell v. Tate*, 1 Dev., 249.

24. Of several pleas, each is separate and independent as if contained in different records; therefore, where, in action for a libel, the defendant pleaded not guilty and justification, *it was held* that the admission of the libel contained in the latter plea, could not be used either to estop the defendant to insist on his denial, or as evidence to prove the publication on the issue joined on the former plea. *Whitaker v. Freeman*, 1 Dev., 271.

25. Where the officer who executes, and the plaintiff who sues out an erroneous *fi. fa.*, are jointly sued in trover, for property sold under it, the former may show his justification under the general issue, though it be jointly pleaded; if, however, they had joined in pleading the justification specially, the plea would be bad as to both. *Weaver v. Cryer*, 1 Dev., 337.

26. A plea is not bad for duplicity, which alleges several facts dependent upon each other, tending to one point, and triable upon one issue, therefore, a plea in abatement to an attachment, averring that a bond and affidavit were not taken or returned, is good upon a general demurrer. And *it seems* that an averment that no bond, &c., were taken, and the said bond, &c., so taken were not returned, is equivalent to an averment that they were not taken and returned, and that the repugnancy does not vitiate. *State Bank v. Hinton*, 1 Dev., 397.

27. Upon a *quantum meruit*, where the defendant pleaded a tender and paid money into court, *it seems* that he is not estopped to show a special contract. *Downey v. Young*, 1 Dev., 432.

28. The jury should, by their verdict, respond to the issues joined between the parties, and they cannot negative a fact admitted by the pleadings; therefore, where the defendant in an action for words pleaded that they were spoken more than six months before the commencement of the suit, and the plaintiff replied "infancy at the time of speaking the words and bringing the suit," a verdict that "the words were spoken within six months before the writ was sued out," was held to be ill, and a *venire de novo* was awarded. *Watts v. Greenlee*, 2 Dev., 87.

29. A plaintiff is not permitted to reply several matters to any plea, except that of set off. *Ibid.*

30. The pendency of a suit by a different plaintiff for the same demand is not matter of abatement, whether the suit be pending in the courts of this or of another state: thus, where the endorsee of a note sued the maker in South Carolina, and pending that suit the endorsee took up the note, and brought a suit in his own name in this state, *it was held* that the pendency of the suit in South Carolina could not be pleaded in abatement of the suit thus brought. *Casey v. Harrison*, 2 Dev., 244.

31. Upon sustaining a demurrer to a plea in abatement, the proper judgment is *quod respondeat ouster*. *Ibid.*

32. In popular actions when *nil debet* is pleaded, the plaintiff must prove his action to have been brought within the period of limitation; and when that plea is entered, a special plea of the statute of limitation presents an immaterial issue. *Dowell v. Vannoy*, 3 Dev., 43.

33. On an appeal from the judgment of a justice, after a plea in the county court, the defendant cannot object to any irregularity which took place before the justice, as that the judgment was rendered after the return day of the warrant. *Arnold v. Shepherd*, 4 Dev., 49.

34. Where one of two joint owners of a chattel sues alone in trespass, advantage can only be taken of the non-joinder by plea in abatement; and the objection comes too late after the defendant has pleaded in chief. *Grakam v. Houston*, 4 Dev., 232.

35. After a defendant has appealed from a justice's judgment and pleaded to the cause in court, he cannot take advantage of a miscontinuance before the justice. *Shipman v. Mears*, 4 Dev., 484.

36. The act of 1796, which prevents a plea since the last continuance from being a relinquishment of former pleas, does not subvert the order of pleading. Therefore a plea in abatement, since the last continuance, necessarily operates a relinquishment of previous pleas in bar. *Morgan v. Cone*, 1 Dev. and Bat., 234. (See Rev. Code, ch. 31, sec. 57.)

37. When a statute requires or directs a thing to be done in a particular court, as well as before a particular man, it cannot be done in or before another. But where the subject matter is within the jurisdiction of any court, an objection to the jurisdiction over the particular parties must be made by plea in abatement, as it is too late after a plea in bar. *State Bank v. Davenport*, 2 Dev. and Bat., 45.

38. Upon an issue joined upon a plea of *nil debent*, to a proceeding under a statute against certain persons as the sureties of the clerk, for not paying over money received by him officially, a verdict is defective, which finds only special facts, as that the money mentioned in the notice was paid to the clerk on a certain day and was demanded, instead of finding specially all the facts on which the defendant's liability arose, or finding generally that they owed the plaintiff, by reason of the matters set forth in the notice, the principal sum demanded and assessed, and the interest, according to the statute. *Ibid.*

39. Where the general issue and a special plea are pleaded to an action on a bond, if the plaintiff means to rest his case upon the insufficiency of the special plea, he should demur to it. If he do not demur to the special plea, but traverses the matter pleaded, he cannot object to evidence which is relevant to support the plea. *Overman v. Clemmons*, 2 Dev. and Bat., 185.

40. If the jury find for the plaintiff upon the general issue, and for the defendant upon the special plea, the plaintiff may yet

contest the sufficiency of the special plea, by praying judgment *non obstante veredicto*. *Ibid*.

41. Accepting a declaration and entering a plea is a waiver of any defect of process; and where process was executed upon five out of six defendants, and all joined in a plea, the fact of its not having been executed upon all does not work a discontinuance of the cause. *Jones v. Penland*, 2 Dev. and Bat., 358.

42. The time of the commencement of a suit, upon a plea of set off *before and at the commencement of the suit*, is the time when the writ was sued out from the proper officer or filled up by the plaintiff's attorney, and not when it is delivered to the sheriff. *Haughton v. Leary*, 3 Dev. and Bat. 21.

43. The only proper plea of a set off is of one due *before and at the commencement of the suit*, because only mutual debts subsisting at the time of action brought, as debts to and from the plaintiff and defendant, can be set off; hence, a plea of set off in bar to the further prosecution of the suit is not sustainable. *Ibid*.

44. A tender and refusal after suit brought is, as a plea, no bar. However, by the modern equitable practice, upon the defendant's paying principal, interest and costs into court, the plaintiff is laid under a rule to receive it or proceed at his peril; but that has been confined to cases of payment, and never has been extended to a set off. *Ibid*.

45. Generally, where matter subsequent bars an action, it consists of some act or agreement on the part of the plaintiff himself, as in the case of a payment received after the action is commenced. *Ibid*.

46. Where there are two defendants, a memorandum of a plea made by entering the word "justification" on the docket, shall be taken as a joint plea, and, unless good as to both, is available as to neither of the defendants. *Love v. Howell*, 3 Dev. and Bat., 70.

47. A plea must be true at the time it is pleaded, and a stipulation in the nature of a defeasance to a bond, by which the obligor is to have a credit upon returning a note to the obligee, cannot avail by making the return on the trial. And evidence of such a defeasance will not support a plea of payment or set off. *Bryan v. Drake*, 3 Dev. and Bat., 72.

48. An objection to the jurisdiction of the court in a penal action, because the action was not brought in the county where the offence was committed, must be brought forward by a plea in abatement, and cannot be taken on the general issue. *Kilian v. Fulbright*, 3 Ired., 9.

49. A plea to the jurisdiction of the superior court of W., which after setting forth that the plaintiff is not an inhabitant of the county of W., but is an inhabitant of the county of H., alleges only "that the defendant was an inhabitant of the county of E., and not an inhabitant of any other county than the county of E.,"

is bad, because it does not expressly aver that the defendant did not reside in the county of W., but only states that fact in an argumentative way. *Moseley v. Hunter*, 3 Ired., 543.

50. A plea to the jurisdiction of the court, properly concludes with the prayer "whether the court will or ought to take further cognizance of the plea aforesaid." *Ibid.*

51. Where there are several plaintiffs in action of tort, and after the pleadings are made up, one of them comes into court and enters a *retraxit*, the proper course for the court is to permit his name to be stricken from the writ and declaration, and suffer the other plaintiffs to proceed with the suit; and in such a case the court should not suffer the defendant to amend his pleadings, by pleading in abatement the want of proper parties. *Wilkinson v. Gilchrist*, 5 Ired., 228.

52. If one of the plaintiffs, in such case, release the defendant, the defendant may plead this in bar since the last continuance, and in England, the other plaintiffs may reply *per fraudem*, and have this issue tried at law. But in this state the rule has been to leave the parties to their remedy in equity. *Ibid.*

53. A plea of accord and satisfaction to a bond is not good unless it avers an acquittance under seal. *Ligon v. Dunn*, 6 Ired., 133.

54. If, in reply to the plea of the statute of limitations, the plaintiff wish to avail himself of the pendency of a former suit, he must set forth the suit specially in his replication. *State v. Hawkins*, 6 Ired., 428.

55. In the practice of this state, if no replication is actually entered, a general one is understood. *Ibid.*

56. When the statute of limitations is pleaded to an action on the bond of a sheriff, clerk, &c., the plaintiff cannot reply that a former suit for the same cause of action had been brought within the proper period, in which there had been a non-suit, discontinuance, &c., as in suits of this kind, there is no such saving against the operation of the statute. *Ibid.*

57. The plea of not guilty to an action of trespass on the person, merely denies that he committed any trespass at all; and if the defendant has matter of justification, he cannot give it in evidence under the general issue, but must plead it specially.—*Meeds v. Carver*, 7 Ired., 273.

58. The plea of *liberum tenementum*, in an action of trespass *quare clausum fregit*, admits the fact that the plaintiff was in possession of the close described in the declaration, and that the defendants did the acts complained of, raising only the question whether the close mentioned was the defendant's freehold or not. *Gilchrist v. McLaughlin*, 7 Ired., 310.

59. A collected a sum of money for B, for which he was sued by B's administrator, and pleaded the general issue only, and it was held, that he could not give in evidence that B had lived with him, and that the expenses of her maintenance amounted

to more than the money collected. He should have pleaded this as a set off. *Donaho v. Witherspoon*, 7 Ired., 351.

60. In an action of slander, when the charge is made directly, the plea of justification should aver the truth of the charge as laid in the declaration; but when the charge is made by insinuation and circumlocution, so as to render it necessary to use introductory matter to show the meaning of the words, the plea should aver the truth of the charge, which the declaration alleges was meant to be made. *Snow v. Witcher*, 7 Ired., 346.

61. In an action of slander, brought by a single woman under the act of 1808, where the words charged were, "that she had lost a little one," "Z. S. is a credit to her," (the said Z. S. being notoriously an incontinent person,) and "she better be listening to the report about herself losing a little one," *it was held* to be sufficient for the defendant to plead and prove that the plaintiff was an incontinent woman. *Ibid.* (See Rev. Code, ch. 106.)

62. Where a defendant wishes to avail himself of a certificate of discharge in bankruptcy, obtained after his pleas had been entered, he must plead it as a plea since the last continuance. *Corpening v. Grinnell*, 10 Ired., 15.

63. Where an assignee of a bond brings an action of debt upon it, and the defendant pleads *non est factum* only, the plea does not deny the assignment. But if the action be one on the case, as given by statute to the assignee of the bond, the general issue denies both the execution of the bond and the endorsement. *Ford v. Vandyke*, 11 Ired., 227.

64. The plea of payment to an action on a judgment, &c., is sufficient to cover the defence of a presumption of payment, or abandonment of claim under the act of 1826. *Butts v. Patton*, 11 Ired., 262. (See Rev. Code, ch. 65, sec. 18.)

65. That the plaintiff, who sues as executor, is not an executor, is a plea in bar, and the defendant may put it in with any other plea in bar. *Shown v. Barr*, 11 Ired., 294.

66. A plea in abatement to the jurisdiction, averring that both the plaintiff and defendant are foreigners, but not averring that the contract sued on was made abroad, is defective and cannot be sustained. *Strawbury v. Heckman*, Busb., 250.

67. After a judgment in the county court, the defendant obtained a *certiorari* on the ground that the county court had no jurisdiction of the cause. On the return of the writ, the defendant pleaded to the jurisdiction of the superior court, because the county court had no jurisdiction; and *it was held* that the plea was bad, the proper course being to apply for leave to put in a plea to the jurisdiction of the county court. *Sluder v. Barnes*, Busb., 469.

68. In an action for a penalty for failing to work upon a public road, the defendant cannot object to the jurisdiction of the county court except by a plea in abatement. *Forbes v. Hunter*, 1 Jones, 231.

69. The plea of *former judgment* contains an averment that it is for the same cause of action, and between the same parties; a judgment, therefore, against one of several obligors, to a joint and several bond, is no bar to an action against other obligors on the same bond, and not even a bar in favor of the one against whom the former judgment was rendered, if he join in a plea with those not formerly sued. *Skuster v. Perkins*, 2 Jones, 217.

70. Where the plaintiff declared against the defendant, as executor, for money had and received by him as executor, he may either, demur for the badness of the count, or move for a non-suit, or claim a verdict on the trial of the general issue, because the obligation has not been proved; and the principle is not varied by the fact, that the allegation is, in its nature, not susceptible of being proved. *Hailey v. Wheeler*, 4 Jones, 159.

71. A release to a party to a suit, made during its pendency and after the issues are joined, cannot operate as a defence, unless it be pleaded specially since the last continuance. *Smithwick v. Ward*, 7 Jones, 64.

72. Matter which does not affect the title of the thing sued for, but only affords an objection to the further prosecution of the suit, as it is then constituted, such as marriage or death, or the plaintiff's taking possession of the thing, must be pleaded, or otherwise specially brought to the notice of the court; but matter which tends to affect the title, such as the confirmation of his deed by an infant, may be given in evidence under the general issue, especially in the action of ejectment. *McCormic v. Legett*, 8 Jones, 425.

See (Arbitration and Award—Remedy on awards, 7,) (Bills of Exchange and Promissory Notes—Remedy on a bill or note, declaration, pleadings and evidence,) (Clerks and Clerks and Masters—Of the responsibility of them and their sureties, 11,) (Covenant, 1-7,) (Detinue—Of the pleadings, evidence, verdict, judgment and execution,) (Ejectment—Of the defence and herein of the consent rule, 30-32,) (Estoppel—By deed, 13-14,) (Executors and Administrators—Of suits by executors and administrators, 12-13-14-19,) (Executors and Administrators—Of their liability to creditors, &c., 5-6-8-10-12-16-17-18-19-20-29-33-34-36-38-46-65-66-77-78-79-82-83-92-93-104,) (Executors and Administrators—Of their liability to legatees and next of kin, 29,) (Penal Statutes, 12,) (Set Off, 2-9-10-15-16-23,) (Widow—Of her dower, 3.)

V. OF REPLEADER.

1. Where there has been a defective or immaterial pleading, so that the finding of the jury does not determine the right, the court ought to award a replader, unless it appear upon the whole record, that no manner of pleading the matter could have availed. *Trice v. Turrentine*, 10 Ired., 343.

VI. OF A VARIANCE BETWEEN THE ALLEGATION AND PROOF.

1. If a promise declared on be an absolute one, and that proved be conditional, the variance is fatal; as where the declaration was that, in consideration that the plaintiffs would pay the defendant one hundred dollars for the lease of a gold mine, he would warrant that they should make that sum in ten days, and the promise proved was, "if they would do the work he would warrant," &c., *it was held*, that the variance was substantial and fatal. *Starnes v. Erwin*, 10 Ired., 226.

2. If a plaintiff declares on a bond executed by two obligors, and produce in proof one executed by one obligor only, it will be a variance between the allegation and proof. *Sellers v. Streater*, 5 Jones, 261.

See (Debt—When the action will lie, 4,) (Executors and Administrators—Of their liability to creditors, &c., 44,) (Pleading—Of the joinder of parties, 7,) (Pleading—Of the verdict and judgment, 6,) (Waste, 14.)

VII. DEMURRING OF THE PAROL.

1. The demurring of the parol had its origin in feudal principles, and does not prevail in this state. *Baker v. Long*, 1 Hay, 1.

VIII. WHAT DEFECTS MAY BE CURED BY PLEADING OVER.

1. Where a plaintiff issued three separate writs on different days against three individuals, endorsing on each writ that it was for the same cause of action and in the same suit as the writ against the other two, and upon their return they were docketed as one suit, and the defendants appeared and put in pleas thereto, *it was held* that, whatever irregularities may have occurred in suing out the writs, these were waived by the defendant accepting a joint declaration and putting in pleas in bar thereto. *Hyatt v. Tomlin*, 2 Ired., 149.

2. An objection to the process, by which a defendant is brought into court, comes too late after he has appeared and pleaded in bar of the action. *Duffy v. Averitt*, 5 Ired., 455.

3. After pleading in chief, it is too late for the defendant to take exception to the writ. *Mills v. Carpenter*, 10 Ired., 298.

4. In an action for an escape, if the defendant wishes to except upon the ground of its being a penal action and brought in the wrong county, he must make the objection by plea in abatement, for after a plea in bar it is no ground for a motion to nonsuit. *Whicker v. Roberts*, 10 Ired., 485.

5. Where, under a proceeding by a warrant against a railroad company, under the Rev. Code, ch. 17, sec. 7, for killing an ani-

mal, a verdict was taken for the value of the animal in the superior court to which the case was taken by appeal, *it was held* to be too late upon an appeal to the supreme court to object there that there had been no valuation of the animal by freeholders. *Aycock v. Wilmington and Weldon Railroad Company*, 6 Jones, 231.

6. Where, under a proceeding given by the act just above referred to, the warrant recited an injury by a railroad company, and commanded that the body of a particular railroad director should be taken, *it was held* that, after a judgment had been rendered against the railroad company and an appeal by it, it could not be said that the suit was against the director, and not against the corporation. *Ibid.*

7. A defendant, who goes to trial before a justice on the merits of the case, without objecting to the want of service of the warrant by a proper officer, cannot afterwards take the objection in an appellate court, for he will be presumed to have waived that and all similar objections before the justice. *Taylor v. Marcus*, 8 Jones, 402.

IX. OF SCIRE FACIAS AND PLEADINGS THEREON.

1. On a *scire facias* to revive a judgment, if the defendant plead that he was formerly imprisoned for the same debt, the plea is bad for want of showing how he was discharged. *Ballard v. Averitt*, Tay., 69, (48.) S. C. 2 Hay., 17, (169.)

2. In a proceeding by *sci. fa.* against the sureties to an appeal bond, the defendants, by not putting the record in issue, admit the statements in the *sci. fa.* to be correct. *Everitt v. Ellison*, 1 Car. L. R., 271, (25.)

3. To a *sci. fa.* against an heir, after a judgment in favor of the administrator upon his plea of "fully administered," if the heir plead "nothing by descent," he cannot, afterwards pending the suit, plead "that since the last continuance the lands have been sold to satisfy other executions." *Exum v. Sheppard*, 2 Murph., 86.

4. A plea to a *sci. fa.* against bail, that the principal had been arrested on a *ca. sa.* and discharged under the act of 1820, was *held* bad on general demurrer, because it did not show the court's jurisdiction in the discharge, nor that it was during the year in which the act was in force, it being repealed in 1821, nor did it specify the kind of discharge, there being two modes under the act, nor did it show that the creditor had notice. *Langley v. Lane*, 3 Hawks, 313.

5. Where a *sci. fa.* on a judgment in detinue issued against a purchaser *pendente lite*, a plea that the defendant purchased at an execution sale against the original defendant, without averring that the title of the plaintiff, though good against the latter,

is not good against his creditors, is bad. *Falconer v. Jones*, 3 Dev., 334.

6. But a plea, that the judgment was confessed to defraud the creditors of the original defendant, is good upon general demurrer. *Ibid.*

7. On a *sci. fa.* against heirs to subject the lands of their ancestor, it is too late for them, after they have appeared and pleaded to the *sci. fa.*, to move to dismiss the proceedings, because no declaration has been served on them, although some of the heirs may have been infants. *Tripp v. Potter*, 11 Ired., 121.

See (Executors and Administrators—Of their liability to creditors, &c., 48-50-62-73-76-97-98-99.) (Heirs, 1-2-8-9-17-18-26-27-28-29-30-35-39.) (Judgment—How a judgment is proved, and *sci. fa.* to revive it.) (Practice—*scire facias*.)

X. OF THE VERDICT AND JUDGMENT.

1. No point can be taken notice of by the court on a special verdict but what appears on the record. *Anonymous*, 1 Hay., 459, (528.)

2. In civil cases, if a general verdict be given on several counts, of which one is bad, there cannot be judgment, because the court cannot say to which the evidence referred. *Mitchell v. Durham*, 2 Dev., 538.

3. Where the jury do not respond to all the issues on the record, their verdict is defective, and no judgment can be rendered on it. *Vines v. Brownrigg*, 2 Dev. 537.

4. In debt on a bond, the verdict need not state its amount. *Branch v. Elliott*, 3 Dev., 86.

5. Where the plaintiff declares in two counts, and the attention of the jury is directed by the judge to one of them only, a general verdict is presumed to have been found on that count, and will be supported as such. *Jones v. Cook*, 3 Dev., 112.

6. A variance between the bond declared on and that produced in evidence can only be taken advantage of on the trial; it forms no ground for arresting the judgment. *So ter v. Davenport*, 4 Dev., 600.

7. Upon sustaining a plea in abatement, the judgment should be, that the plaintiff's writ be quashed, and that the defendant recover his costs. *Morgan v. Cone*, 1 Dev. and Bat., 234.

8. If either of two counts in a declaration be defective, and the verdict be entered generally upon both, the plaintiff cannot have judgment. *Honeycut v. Angel*, 4 Dev. and Bat., 306.

9. In an action of assumpsit to recover back money paid as usurious interest, the verdict was as follows: "find all payments within three years, either on notes given before or otherwise with interest thereon, in favor of the plaintiff, to wit, \$558 and \$100, with interest on the same;" and the judgment on the ver-

dict was "for the sum of \$935, of which \$658 bears interest from the 10th day of October, 1847, till paid;" and *it was held* that the judgment did not appear to correspond with the verdict and that, even if it did, the verdict itself was insufficient and insensible. *Murray v. King*, 8 Ired., 528.

10. A verdict cures all omissions or defects, which must necessarily have been passed upon by the jury. *Nixon v. Nunne-ry*, 9 Ired., 28.

11. A verdict is not too vague when it responds to the issue. *Ibid.*

12. In cases of verdicts subject to the opinion of the court, all the points on which either party means to insist ought to be reserved, for all points not reserved are taken to have been given up. And if one of the parties cannot have inserted a question on which the judge inclines against him, he ought not to consent to such a verdict, but peremptorily claim that an opinion shall then be given to the jury, as he has a right to do. *Brooks v. Ratcliff*, 11 Ired., 321.

13. In an action of trespass for an assault and battery, a verdict for \$100 as actual, and \$1,000 as exemplary, damages is a good verdict for \$1100 damages. *Pendleton v. Davis*, 1 Jones, 98.

14. In the action of trespass *quare clausum fregit*, a verdict which gives interest on the damages assessed is erroneous, but the court may allow the plaintiff to enter a *remittitur* as to the interest. *Connelly v. McNeil*, 2 Jones, 51.

15. A "judgment by default according to specialty filed for \$124 and costs, of which \$120 is principal money" is a proper judgment in *assumpsit*, and is not the proper form of a judgment in *debt*. *Neal v. Hussey*, 3 Jones, 70.

16. Where there are two counts in a declaration, and evidence is given on both, upon which there is general charge by the court on the facts applying to each count, a general verdict on both counts is not erroneous. *Morehead v. Brown*, 6 Jones, 367.

17. Where there is a common intent among several to beat an adversary, or where the parties are all present aiding, abetting or encouraging, or have become principals by previously counseling the violence, a joint verdict against all is proper. *Smithwick v. Ward*, 7 Jones, 64.

18. Where a declaration contains two counts, and testimony is given as to both, and the judge charges the jury as to both, and a general verdict is rendered for the plaintiff, if one of the counts be defective, or an error has been committed on the trial as to one of them, the defendant is entitled to a new trial. *Wilson v. Tatum*, 8 Jones, 300.

19. In an action of debt for a penalty to which *nil debet* is pleaded, a verdict finding all the issues in favor of the plaintiff, and "assessing his damages to \$500," (the amount of the penal-

ty,) does not conform to the pleading, and no judgment can be given on it. *Albright v. Tapscot*, 8 Jones, 473.

See (Damages—By what rule to be assessed, 8,) (Detinue—Of the pleadings, evidence, verdict, judgment and execution,) (Executors and Administrators—Of their liability to creditors, and herein of suits against them and their defence, 2--3--28--39--40--43--44--45--46--50--58--70--71--76--97--98--99--101--112--113,) (Ferry, 4,) (Pleading—Of pleas, replications and demurrers, 5--28--31--38--40,) (Practice—Of the trial and its incidents, 12,) (Waste, 6--7.)

XI. OF WRITS OF ERROR.

1. When a defendant may avail himself of any objection by plea in abatement, he cannot afterwards assign it as error.—*Powell v. Hampton*, Conf. Rep., 86, (218.)

2. It is not error that the jury were summoned by the sheriff, who was a party in the cause, because the opposite party might have challenged the array. *Ibid.*

3. A garnishee may have a writ of error on the judgment against himself, or the defendant in the attachment. *Haughton v. Allen*, Conf. Rep., 157, (277.)

4. A writ of error is a writ demandable as a matter of right. *Ibid.*

5. When the verdict is for more than the damages laid in the writ, the variance is fatal on a writ of error, unless the plaintiff will enter a *remittitur* for the surplus. And leave will be given him to do so upon paying the costs of the writ of error. *Singleton v. Kennedy*, Conf. Rep., 520, (566.)

6. The plaintiff in a writ of error, upon a reversal of the judgment, is not entitled to restitution of lands sold under an execution issued upon the judgment, but to the money arising from the sale. *Bickerstaff v. Dellinger*, 1 Murph., 272.

7. If, in consequence of some error in the verdict of the jury, the judgment be arrested, and afterwards, during the same term, a *venire de novo* be awarded, and at the next term, a verdict be found for the plaintiff, the defendant cannot assign for error, that there had been a verdict and arrest of judgment at the preceding term, for though the proceedings at that term were informal, they were in substance the setting aside of the judgment and the grant of a new trial, which the court had the power to do at the same term. *White v. Creecy*, 2 Murph., 115.

8. A writ of error cannot be sustained and errors assigned to process in nature of an execution, for that if irregular must be set aside in a different way. Nor will a writ of error lie properly to a judgment, unless it is one rendered by a court of record, which that of a justice is not. Hence a writ of error will not

lie to reverse an order of the county court for the sale of land after a constable's levy on it, upon an execution from a justice. *Bowen v. Lanier*, N. C. Term R., 241, (673.)

9. The rule in writs of error is, that all persons against whom a joint judgment is given must join in it, or if any of them refuse, he or they must be summoned and severed. But there would be an absurdity in requiring a party to join in a writ of error, in whose favor the judgment below is rendered; and summons and severance apply only where the judgment was given against the party who will not join. The like rule prevails as to appeals. *Sharpe v. Jones*, 3 Murph., 306.

10. The refusal of an inferior court to allow pleadings to be amended, or to continue a cause, or any other exercise of a mere power of discretion, held not to be an error, for which judgment will be reversed on an appeal or writ of error. *Armstrong v. Wright*, 1 Hawks, 93.

11. Writs of error are only necessary when the court has power to act, but mistakes the law. But when the court has not by law an authority to act, its acts are void and may be set aside on motion. *Whitney v. Black*, 2 Hawks, 179.

12. Where two executors confessed a judgment to a co-partnership, of which one of them was a member, it was held to be an error in fact, for which the judgment should be reversed, the law prohibiting the same person from being both plaintiff and defendant in the same cause. *Pearson v. Nesbit*, 1 Dev., 315.

13. If damages be given beyond the penalty of the bond, and that is the only error on the record, the judgment will be reversed only for the excess. *Smith v. Shepard*, 1 Dev., 461.

14. A writ of error can only be brought by parties and privies. Hence, in ejectment, the tenant, before he is made a defendant, cannot bring a writ of error. *Bledsoe v. Wilson*, 2 Dev., 314.

15. The supreme court acquires jurisdiction as a revising tribunal only by appeal, and its jurisdiction differs from that of those courts which take cognizance of causes by writ of error. *Binford v. Alston*, 4 Dev., 351.

16. A writ of error is considered as a new action, in which the plaintiff may be non-suited, and when it is brought contrary to an agreement, the court may compel him to submit to a non-suit. *Ibid.*

17. A writ of error *coram nobis* is not a writ of right. Before it is allowed there must be an affidavit of some error *in fact*, by which, in case the fact to be assigned for error is true, the plaintiff's right of action will be destroyed; and it is a matter of discretion with the court, before which the application is made, whether upon the affidavits it will grant the writ or not, which cannot be revised by this court upon an appeal. *Tyler v. Morris*, 4 Dev. and Bat., 487.

18. The court, upon an application for a writ of error *coram*

nobis does not decide the fact assigned for error, *definitively*. If the writ be granted, the other party when brought in may plead and take issue upon the fact, which must be tried by a jury and not by the court. *Ibid.*

19. A writ of error *coram nobis* is not in itself a *supersedeas*; it is so or not according to the circumstances, and, therefore, execution cannot be sued out after the allowance of a writ of error without the leave of the court, and whether the *superse. deas* shall issue, after the allowance of such writ, must depend on circumstances to be judged of by the court. *Ibid.*

20. One defendant alone cannot ask for a reversal for error of a joint judgment against himself and another. *Leatherwood v. Moody*, 3 Ired., 129. (*Quere* whether this rule is not altered by the Rev. Code, ch. 4, sec. 27, in relation to appeals from a joint judgment by one defendant only.)

21. In a writ of error *coram nobis* only such errors in fact can be assigned, as are consistent with the record before the court in which the case was tried. *Williams v. Edwards*, 12 Ired., 118.

22. An appeal was taken to the supreme court, and a final judgment there rendered; and a writ of error *coram nobis* was then sued out in the superior court upon the ground that one of the parties had died before the trial in that court; and it was held that it could not be sustained. *Latham v. Hodges*, 13 Ired., 267.

23. Error for matter of fact lies only in the court in which the record and judgment are, and not to reverse the judgment of another, and especially, of a higher court. *Ibid.*

24. The supreme court has no power to issue a writ of error to the superior court. *Smith v. Cheek*, 5 Jones, 213. (The supreme court may now issue a writ of error within two years to revise or review one of its own judgments or decrees. See Rev. Code, ch. 33, sec. 19.)

25. An error in dismissing a suit for the supposed want of a prosecution bond, when in fact one had been filed, cannot be remedied at a subsequent term by motion, but only by a writ of error *coram nobis*. *Arrowwood v. Greenwood*, 5 Jones, 414.

26. A writ of error *coram nobis* lies from any court of record, returnable to itself, and not from a superior to an inferior court of record. *Roughton v. Brown*, 8 Jones, 393.

27. Only the parties to a judgment, as to whom there is an error of fact, need join in a writ of error *coram nobis*. But if the error be in a judgment taken against a *feme covert*, her husband must join with her in the writ of error *co. a n nobis*. *Ibid.*

PLEDGE.

1. When one pledges a chattel in the presence of the owner without objection on his part, it would authorize any bystander to deal with the pawner if the pledge were satisfied. *Bird v. Benton*, 2 Dev., 179.

2. In a verbal pledge to a surety, a power to sell the property and pay himself, and return the balance to the pawner, authorizes the surety to sell whenever he is in danger of being forced to pay the debt for which he is bound, and before actual payment by him. *Ibid.*

3. A pledge of personal property, as for example a pledge of bank stock, differs from a mortgage, and is not included within the meaning of the registry act. *Doak v. Bank of the State*, 6 Ired., 309. (See Rev. Code, ch. 37, sec. 22.)

4. A pledge is a deposit of personal effects, not to be taken back but on payment of a certain sum, which is by express stipulation to be a lien upon it. A mortgage is a pledge, and something more, for it is an absolute pledge, to become an absolute interest if not redeemed in a certain time. *Ibid.*

5. Generally speaking, a bill in equity to redeem will not lie on behalf of a pledger or his representatives, as his remedy is at law upon a tender of the money. *Ibid.*

6. The whole court united in the opinion that pledges of bank stock did not come within the operation of the registry act, but *Ruffin*, C. J., differed from the majority of the court as to the operation of that act upon pledges of tangible personal property which is liable to execution, the majority holding that the act did not extend to them, and he being of opinion that it did. *Ibid.*

7. A chattel delivered as a pledge to secure a debt, and re-delivered by the pledgee to the pledger, is liable to be seized and sold by a creditor of the pledger under an execution against him. *Barrett v. Cole*, 4 Jones, 40.

8. A chattel delivered as a pledge to secure a debt, and re-delivered by the pledgee to the pledger, if sold by the pledger to a purchaser without notice, passes to him, and the pledgee loses his right to it. *Smith v. Sasser*, 4 Jones, 43.

9. A slave cannot, by a parol agreement, stand as a security for money without being delivered to the pledgee. *Propst v. Roseman*, 4 Jones, 130.

10. If the pledgee deliver up to the pledger the thing pawned, though but for a special purpose, he will lose the benefit of his lien as between himself and a *bona fide* purchaser from the pledger. *Bodenhammer v. Newsom*, 5 Jones, 107.

11. To constitute a pawn or pledge, the article must be delivered to the pawnee. *Owens v. Kinsey*, 7 Jones, 245.

12. In order to constitute a pledge there must be evidence that the article was delivered for that purpose to the pawnee. *Thompson v. Andrews*, 8 Jones, 453.

POOR.

1. The wardens of the poor may exercise the power, given them by act of assembly, to seize horses, cattle, hogs or sheep belonging to a slave, either in person, or by a precept or authority directed to another. And such a precept or authority directed to "any constable of the county," without specifying his name, will justify the constable who executes it, if his act be afterwards ratified by the wardens. *McNamara v. Kerns*, 2 Ired., 66. (See Rev. Code, ch. 86, sec. 20.)

2. It is not necessary that to such authority or precept the wardens should sign their names as wardens, if in fact they were so. *Ibid.*

3. By the phrase "horses, cattle, &c., *belonging* to slaves," the act means such horses, cattle, &c., as the master permits the slave to raise for his, the slave's, own use, and to exercise acts of dominion and ownership over, as if they were his own. *Ibid.*

4. Wardens of the poor, who are elected by the county court under the provisions of the act of 1846, are not subjected to any penalty for refusing to accept the appointment. *Smithwick v. Williams*, 8 Ired., 268. (See Rev. Code, ch. 86, sec. 4, which now prescribes the penalty of \$20, for such as refuse or neglect to qualify.)

5. In the case of an order made by the wardens of the poor of a county, that a particular sum should be allowed and placed in the hands of A, payable semi-annually for the benefit of a pauper, *it was held* that the order might be repealed during the first half year, although A had proceeded to purchase provisions for the whole year, and that under a proper construction of the order he was entitled to only the first semi-annual payment. *Edwards v. Branch*, 7 Jones, 90.

See (Constitution—Acts which have been declared constitutional, 18,) (Indictment—In what cases an indictment will lie, 83,) (Penal statutes, 7.)

POSSESSION.

1. Adverse possession is constituted by an actual exclusive

possession, taken or held with the intent to put or keep out all others. The title, which the party has, is not therefore decisive of the character of the possession; for frequently that is to be inferred more from the title, which the deed under which he claims *purports* to convey, than from that which it really *does* convey. *Murray v. Shanklin*, 4 Dev. and Bat., 289.

2. The possession by the tenant of a particular estate in chattles is not, after the expiration of the particular estate, necessarily adverse to the remainderman, but it may be so, and that without any act or declaration of his to that effect; and, therefore, it is proper to be left to the jury to infer, if they so think, from the circumstances of the case, that the possession of the particular tenant, after the expiration of his estate, was adverse to the remainderman, without any precise declaration to that effect, or any act for the special purpose of making known his claim. *Montgomery v. Wynns*, 4 Dev. and Bat., 527.

3. Adverse possession consists of actual possession, with an intent to hold solely for the possessor to the exclusion of others, and, as no color of title is requisite on which to found the possession of personal chattles, the possession will be adverse with or without a good title if the party holds for himself. *Ibid.*

4. The entering upon, ditching and making roads in a cypress swamp for the purpose of getting shingles therein, and cutting down the timber trees and making shingles out of them, is, in law, a possession of the swamp. *Tredwell v. Reddick*, 1 Ired., 56.

5. The constructive possession of land, arising from title, cannot be extended to that part of it whereof there is an actual adverse possession, whether with or without a paper title.—*Ibid.*

6. Where the grants or deeds lap, and neither party has *actual* possession of the *lapped* part, the law adjudges the possession of that part to be in him who has the better title; but if either be *actually* in possession of the *lapped* part, the law adjudges him to be in the exclusive possession thereof. *Williams v. Buchanan*, 1 Ired., 535.

7. Possession of land is denoted by the exercise of acts of dominion over it, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state—such acts to be so repeated as to show that they are done in the character of owner, and not of occasional trespasser. Thus, in a stream not navigable, keeping up fish traps therein, erecting and repairing dams across it, and using it every year during the entire fishing season for the purpose of catching fish, constitute an unequivocal possession thereof. *Ibid.*

8. If one enters into land under a deed or will, the entry is into the whole tract described in the conveyance, *prima facie*, and is so in reality, unless some other person has possession of a

part, either actually or by virtue of the title. But where one enters on land, without any conveyance, or other thing to show what he claims, his possession cannot by any presumption or implication be extended beyond his occupation *de facto*. *Bynum v. Thompson*, 3 Ired., 578.

9. Where one, under a partition of land made by order of court according to act of assembly, takes actual possession of a part of the share allotted to him, his possession will be deemed to be extended to the boundaries of the share so allotted, in the same manner as if he had taken possession under a deed. *Ibid*.

10. The occupation of pine land, by annually making turpentine upon it, is such an actual possession, as will oust a constructive possession of another claiming merely under a superior paper title. *Bynum v. Carter*, 4 Ired., 310.

11. Where the extent of the wrongdoer's possession is so limited as to afford a fair presumption that the party mistook his boundaries, and did not intend to set up a claim within the boundary of the other party, it would be a proper ground for saying that he had not the possession, or that it was not adverse; but it is otherwise where the possession was willful, open and notorious. *Ibid*.

12. Where land is lapped by two deeds or grants, the adverse possession for seven years by a person, not being in possession of the lapped part, cannot give him any right against the superior title to the part so lapped. *Smith v. Ingram*, 7 Ired., 175.

13. If two grants lap and one of the claimants be seated on the lapped part, and not the other, the possession of the whole lapped part is in the former exclusively, possession of part of the lappage being possession of all of it. *Williams v. Miller* 7 Ired., 186.

14. Where a tenant claims by a disseizin ripened into a good title by lapse of time, he must show an actual, open and exclusive possession and use of the land as his own, *adversely* to the title of the demandant; and it must be known to the adverse claimant, or be accompanied by circumstances of notoriety. *Gilchrist v. McLaughlin*, 7 Ired., 310.

15. Where a person intends to place his fence on a particular line, but accidentally places a small part of it on land claimed by another, this will not be a possession adverse to such claimant. *Ibid*.

16. The actual possession under color of title for seven years, though of a very small portion of the land and that in the midst of the woods, will confer title on the possessor to the whole tract covered by his grant, there being no actual possession of any other part by another person. *Lenior v. South*, 10 Ired., 237.

17. When a man claims title under color of title and seven years possession, it is not evidence of the adverse possession, that he had put the wife of one who claims to be the owner of land in possession. When a husband is in possession, he is not

deprived of it by any arrangement between his wife and a third person, pretending to own the land, and to put her in possession. *Powell v. Felton*, 11 Ired., 469.

18. An entry into possession under a deed, into a part of a tract of land, shall, as against a mere wrong-doer, be considered an entry into the whole, it not appearing that any one else has possession of any part. *Osborne v. Ballew*, 12 Ired., 373.

19. Where one enters under a conveyance of some colorable title for a certain parcel of land, the rule is, that a possession of part is *prima facie* possession of the whole, not actually occupied by another, as the documentary title defines the claim and possession. But it is otherwise, when one enters without any color of title, for then there is nothing, by which the possession can be constructively extended beyond his occupation. *Berryman v. Kelly*, 13 Ired., 269.

20. If two grants lap, and while neither grantee is settled upon the lapped part, the junior enter upon the lappage and clear, enclose and cultivate a field upon it for seven years, he will acquire a title to it. But, if at the time he encloses his field, it be with the permission of the elder grantee, upon his agreeing to set his fence back whenever it appears by a survey that it is over the line of the elder grant, his possession of the field will not prevent the elder grantee, or one claiming under him, from having his lines run under the processioning act according to the calls of his grant. *Bryson v. Slagle*, Busb., 449. (See Rev. Code, ch. 88.)

21. Where two grants lap upon each other, so that both cover in part the same land, the possession of the lappage is in law in him who has the better title, unless there be, by the party claiming under the other, an actual possession, or *possessio pedis* thereon. *Brown v. Potter*, Busb., 461.

22. The possession of two tracts of land adjacent to the one in controversy for seven years with color of title, though they had all been conveyed in one deed, but by separate and distinct descriptions, is not a possession of the land in question, so as to amount to a bar under the statute of limitations. *Loftin v. Cobb*, 1 Jones, 406.

23. The cutting of trees for a saw mill, and the feeding of hogs upon a tract of land susceptible of other uses and mode of enjoyment, under a color of title for seven years, do not constitute such an adverse possession as will bar an entry. *Ibid.*

24. The possession of one tract of land is no possession of an adjoining tract, when they are held by the same person under different titles. *Morris v. Hayes*, 2 Jones, 93.

25. Making pole bridges over a ditch on the side of a public road for driving cattle into a tract of swamp land, and the ranging of cattle on the land, and the occasional cutting of a few

timber trees there, is not such a possession as will maintain trespass *quare clausum fregit*. *Ibid*.

26. Where neither of the owners of two interfering tracts of land has actual possession of the part common to both, the law adjudges the possession to have been in him who has the elder title. *Baker v. McDonald*, 2 Jones, 244.

27. If two grants lap, and the junior grantee be settled on the lapped part, while the other has no actual occupation of any part of it, the possession of the whole lapped part will be in him who is thus settled upon it; and he may maintain trespass *quare clausum fregit* against a person who enters upon such lapped part under a grant younger than his, as well as against a wrongdoer. *McCormick v. Munroe*, 3 Jones, 332.

28. A person claiming a tract of land under a color of title and who puts a servant in a house situate upon it, giving him the privilege of getting fire wood, is in possession of the whole tract as against a wrongdoer, and can maintain trespass against him for entering and cutting wood on the woodland. *Lamb v. Swain*, 3 Jones, 370.

29. The operations of persons merely hunting gold upon land is not such a possession of it as will bar an entry. *Ward v. Herrin*, 4 Jones, 23.

30. The acts of going yearly, for a few weeks at a time, to get rails and other timber from land, which is only valuable for timber, do not amount to such an exercise of ownership as will ripen a defective title, or give a right to an action of trespass *quare clausum fregit*. *Bartlett v. Simmons*, 4 Jones, 295.

31. Where a trust of land is created by the agreement of the parties, the possession of the *cestui que trust* is not adverse to the trustee, and cannot, by long continuance, divest the title of the trustee. *Taylor v. Gooch*, 4 Jones, 436.

32. Where it was uncertain whether a possession relied on to give title to land commenced in February or March, and which was insufficient if commenced in the latter month, *it was held* that if the possessor could not show that it began in the former month, he could derive no benefit from it. *Edmonston v. Shelton*, 4 Jones, 451.

33. Where one person gets possession of the property of another, and claims it under an alleged title as his own, for any length of time, his possession is necessarily adverse to the rights of the true owner. *Smith v. Reid*, 6 Jones, 494.

34. The fact that one enters into possession of a tract of land immediately after another leaves it, claiming another part of the tract under a deed which covered that part, but not the first, is no evidence that he holds the first part under the same person whose deed covered the second part. *Blackstock v. Cole*, 6 Jones, 560.

35. The existence of the easement of ponding water on land

for the use of a mill is not an adverse possession of the soil covered by the water of the pond, and no length of time in the enjoyment of the easement will afford a presumption of the grant of the soil. *Everett v. Dockery*, 7 Jones, 390.

36. Proof that a person "cut trees in a pond which had been sawed up at his mill," is not sufficient to show an adverse possession by him of the soil covered by the water of the pond. *Ibid.*

See (Ejectment—Of the title necessary to support the action.) (Estoppel—By deed, 17.) (Trespass—Of trespass *quare clausum fregit*, 17–24.)

POST MASTER.

See (Appeal—From the superior to the supreme court, when allowed and its effect, 26.)

POWERS.

1. In the execution of a power, it is not necessary to recite that the act is done by virtue of the power, but it is sufficient if it can be done *only* in pursuance of it; for the purpose of the act can only be explained by resorting to the power. *Hendricks v. Mendenhall*, 2 Car. L. R., 569, (371.)

2. Under a power given by a testator to his "executors" to sell land, a conveyance by the only one who qualifies will be good, although the others have not formally renounced, or refused to join in the sale. *Wood v. Sparks*, 1 Dev. and Bat., 389.

3. A general power to sell, given to a stranger in a deed of bargain and sale, or a covenant to stand seized to uses, is void, and a conveyance made under it is also void. *Smith v. Smith*, 1 Jones, 135.

4. A power to sell land conferred on an executor is a common law power. It is an appointment that operates as a designation of the person to take under the will, and the purchaser will be in under the will. No seizin is necessary to serve the power, and no adverse possession, short of seven years under a color of title, will stand in the way of its execution. But such a possession for seven years under a color title, reckoned from the day when the authority commenced, will bar, because the power and

the estate are regarded as the same thing. *Rodgers v. Wallace*, 5 Jones, 181.

5. A naked power to sell, given by will to an executor, who was also appointed guardian by the will, both of which offices were renounced and the power not exercised, *was held* not to enlarge a life estate, given to the ward, into a fee, so as to enable him, or any other person appointed by the court as guardian, to convey a fee. *Sawyer v. Dozier*, 7 Jones, 7.

6. A devise of "all my property to my beloved wife during her natural life or widowhood, with power to dispose of the same by sale, will or otherwise, at her discretion," *was held* to confer upon her, she not having married again, the power to convey the land in fee simple. *Stroud v. Morrow*, 7 Jones, 463.

PRACTICE.

I. Continuance of a cause.	X. Non-suit and Nolle prosequi.
II. Removal of causes.	XI. Writs of false judgment, of error and of supersedeas.
III. Scire facias.	XII. Dismissing a suit.
IV. Of the trial and incidents.	XIII. Discontinuance—Death of parties.
V. Of default and enquiry.	XIV. Costs.
VI. Appearance and proceeding against one of several defendants.	XV. Judge's charge.
VII. Payment of money into court.	XVI. Practice in the Supreme Court.
VIII. Consolidating suits.	XVII. Equity practice in suits of an equitable nature brought in courts of law.
IX. References, motions, orders, rules and notices.	

I. CONTINUANCE OF A CAUSE.

1. After a jury is empanelled in the superior court, and it appears that one of the jurors sat on the trial in the county court, the court will order a mis-trial, and a continuance of the cause, though one of the parties object to the continuance. *Kaighn v. Kennedy*, Mar. 37, (26.)

2. On an indictment for an assault and battery, the court will not continue a cause for the absence of a witness who can prove great provocation only, but after verdict will suspend the judgment until the witness can be heard. *State v. Sheppard*, Mar. 47, (42.)

3. Where a cause had been depending three years in the county court, and five in the superior court, and the plaintiff had been uniformly ready for trial during the last three years, the court ordered the defendant to pay the costs of the plaintiff's witness

during the term, as the condition of another continuance. *Tyce v. Ledford*, 1 Hay., 25, (35.)

4. A party, who has been guilty of neglect, may, upon asking a continuance, be compelled to pay the costs of the term, as the condition of the continuance; and those costs are not to be refunded, though he should succeed in the cause. *Park v. Cochran*, 1 Hay., 178, (205.)

5. If a continuance be moved for because an order of survey has not been executed, it must be shown by affidavit that the survey is necessary. *Harget v. Foscue*, 2 Hay., 145, (318.)

6. A continuance may be granted on the affidavit of the plaintiff's attorney, or of any other person, when the party is out of the State. *Wheaton v. Cross*, 2 Hay., 154, (334.) But see *contra Sheppard v. Cook*, *Id.*, 241, (426.)

7. If there be a demurrer to one plea, and an issue on another, the latter may be tried, while the court may continue the demurrer. *Cunnison v. Hunter*, 2 Hay., 326, (495.)

8. If the State move for a continuance, and the defendant has a material witness residing out of the State, the court may impose a condition for the continuance, that the deposition of the defendant's witness may be read on the trial. *State v. —*, 2 Hay., 405, (612.)

9. If a party and his witnesses are absent, the court will require the absence of the party to be accounted for, before they will continue the cause. *Crites v. Lanier*, Tay., 16, (12.)

10. A judge of the superior court has power to continue a cause upon the condition of reading absolutely the deposition of a resident witness; and a party accepting the terms cannot, on the trial, insist on the production of the witness. *Walker v. Greenlee*, 1 Dev., 367.

11. The question for the continuance or removal of a cause is one exclusively for the discretion of the superior court and cannot be revised in the supreme court. *State v. Duncan*, 6 Ired. 98.

12. The act of 1861, (2nd extra session,) ch. 10, sec. 4, did not affect questions as to the continuance of causes coming before a court, whose sitting commenced on — Monday of the week, during which the act was ratified and went into operation. *Foust v. Trice*, 8 Jones, 490.

II. REMOVAL OF CAUSES.

1. An affidavit for the removal of a cause is sufficient, if it state that the adverse party has considerable influence, which he will probably exert, and that many persons hold freeholds under him and may be turned off at pleasure. *Smith v. Hortler*, 1 Car. L. R. 518, (131.) (See Rev. Code, ch. 31, sec. 115.)

2. If upon the removal of a prosecution to another county for trial the clerk send the original indictment, instead of a copy,

and the defendant be convicted, it is no ground for an arrest of the judgment. *State v. Johnson*, 2 Murph., 201.

3. Where a suit had been depending several terms, and one of the defendants married, and her husband was made a party, it was held that he might, on sufficient affidavit, have the cause removed to another county for trial. *Knowis v. Baker*, 2 Car. L. L., 98, (196.)

4. It is not competent for the owners of slaves or their counsel to consent to the removal of a criminal cause against such slaves; it cannot be removed otherwise than on affidavit. *State v. Poll*, 1 Hawks, 442.

5. An affidavit for the removal of a cause, which does not set forth the grounds of affiant's belief that justice cannot be done in the county from which it is proposed to be removed, is insufficient. *State v. Twitty*, 2 Hawks, 248.

6. If, upon the second removal of a cause, the clerk should transmit the same papers which had been sent to his office upon the first removal, and the prisoner should be tried and convicted thereon, it will furnish no cause for the arrest of the judgment. *State v. Lewis*, 3 Hawks, 410.

7. The deputy clerk of the court, from which a cause is removed, may amend the transcript by the original record produced in court. *State v. Upton*, 1 Dev., 513.

8. Where a cause is removed for trial, it is the exclusive duty of the judge of the superior court to determine the fact, whether the transcript of the record was certified under the seal of the court. *State v. Moses*, 2 Dev., 452.

9. Where, upon the removal of a cause, two contradictory transcripts of records are certified, the contradiction can be reconciled by an inspection of the original record by the court to which it is removed; but where the transcripts are not contradictory, they form but one copy, and both may be used by the court. *State v. Collins*, 3 Dev., 117.

10. Rules made by consent after an order for the removal of a cause, but before it is removed, are not erroneous. *Smith v. Greenlee*, 3 Dev., 387.

11. An affidavit for the removal of a cause is sufficient, which states "that the defendant cannot have a fair and impartial trial in this county, owing to the great prejudice existing against him; that the plaintiffs are men of great influence in this county, and the affiant believes they will exercise their influence to his prejudice." *Ibid.*

12. It is not necessary in an affidavit for the removal of a cause that the belief of the affiant should be stated; it is sufficient if it sets forth the facts on which he grounds his belief. *State v. Seaborn*, 4 Dev., 305.

13. An order of removal to "Cumberland county," without saying to the superior court of the county, is sufficient. *Ibid.*

14. The judge of the superior court alone can decide on the sufficiency of the facts stated in an affidavit for removal, and his decision is final. *Ibid.*

15. Where the time of holding a court, mentioned in an order of removal, differs from the true time as fixed by law, it is mere surplusage, and does not vitiate the subsequent proceedings. *Ibid.*

16. Although one court cannot take any posterior action in a cause after it has been removed to another for trial, yet it may afterwards amend by supplying an omission in the record, which occurred prior to the order of removal; and may then send a new transcript of the amended record to the court to which the cause was removed. *State v. Reid*, 1 Dev. and Bat. 377.

17. Upon a suggestion of the diminution of the record, the defects alleged may be supplied, by sending a new transcript, or by making insertions in that before sent; and, in the latter case, if the proper officer make insertions, from a memorial containing the facts omitted, it is no objection that he had not the record of the whole proceedings present. *Ibid.*

18. When a trial is authorised upon a transcript, it is presumed to give the whole tenor of the record; but as it may not, either party, upon a proper suggestion of a diminution of the record, may have the proceedings stayed until a more perfect transcript be obtained; and this is usually done by a writ of *certiorari*. *Ibid.*

19. It will be no objection that the transcript was made out from the proceedings in *paper*, instead of being taken from the *roll*, provided the transcript be a true transcript of the whole record. *Ibid.*

20. *It seems* that a cause cannot be removed from one superior court to another for trial, before issue joined. *Ibid.*

21. After a cause is effectually removed from one court to another for trial, the first has no further jurisdiction over it. But if the order of removal be premature, the court to which the case is sent acquires no jurisdiction, but the cause remains in the court where it commenced. *Ibid.*

22. After a trial and conviction have been had in a county to which the cause has been removed, upon a motion in arrest of judgment for an alleged defect in the transcript of the record, the judge may suspend the judgment, and issue a *certiorari* for a more perfect transcript; and if, upon the return of the *certiorari* to the next term, it appear that the first transcript contained a full and complete record of the proceedings, although it was written upon two separate and detached sheets of paper, the first containing the indictment, plea and order of removal, and the second the other entries, with the certificate of the clerk, the court may then proceed to pronounce judgment; for it then ap-

pears, that it had jurisdiction of the cause at the time the trial took place. *State v. Scott*, 2 Dev. and Bat., 35.

23. Where two or more are indicted together, it is competent for the court to order a removal of the trial of one on his application, to another county, without removing the trial of the others. *State v. Martin*, 2 Ired., 101.

24. The question of the removal of a cause, on the application of a prisoner in a capital case, is one for the exclusive discretion of the superior court and cannot be reviewed in the supreme court. *State v. Duncan*, 6 Ired., 98.

25. The court, to which on the removal of a cause, the transcript of the record is sent, is the sole judge whether the transcript is properly verified by the seal of the court from which it is sent, and all other courts are bound by its decision. *State v. Duncan*, 6 Ired., 236.

26. An order of removal directing that "the trial of the prosecution shall be removed," &c., is sufficient without directing further that "a copy of the record of the said cause be removed," &c. *State v. Shepherd*, 8 Ired., 195.

27. An affidavit for the removal of a cause ought no more to be inserted as a part of the record, than one for a continuance. *State v. Barfield*, 8 Ired., 344.

28. It is the province of the court, in which the trial takes place, to judge of the truth or sufficiency of the causes assigned for a motion for a removal or continuance of a trial. *State v. Hildreth*, 9 Ired., 429.

29. A superior court, at a special term, has the same power to remove a cause to another county, that it has at a regular term. *Sparkman v. Daughtry*, 13 Ired., 168.

30. The finding a new bill of indictment for the same felony, varying the terms in which the offence is charged, is simply adding a new count, and the whole constitutes but one proceeding; an order, therefore, for the removal of the cause, applies to the several bills that have been found against the defendant. *State v. Johnson*, 5 Jones, 221.

III. SCIRE FACIAS.

1. A *sci. fa.* against the heir is not necessary, where there was a judgment against the ancestor in his lifetime. *Baker v. Long*, 1 Hay., 1.

2. Lands descended to an heir are not affected by a judgment against an executor as such; they must be proceeded against by *sci. fa.* to the heir, when *plene administravit* has been found for the executor. *Baker v. Webb*, 1 Hay., 43, (55.)

3. A *sci. fa.* against an infant heir to charge lands may be served on a guardian *ad litem*, though there ought properly to be

a regular guardian. *Gardner v. Ellis*, Tay., 106, (62,) S. C. 2 Hay., 74, (241.)

4. On a *sci. fa.* against a sheriff, issued on an amercement *nisi* for not returning a writ, to which the sheriff appears and pleads, the plaintiff is entitled to a trial at the return of the *sci. fa.* *Hogg v. Bloodworth*, Conf. Rep., 477, (531.)

5. If two *sci. fas.* be issued to the county where a witness resided when he was summoned, and on them "not found" is returned, it warrants the entry of a judgment against him. *Thompson v. Johnston*, 1 Car. L. R., 491, (103.)

6. A *sci. fa.* to revive a judgment, though to some purposes a new action, yet, in the main, is to be regarded as a continuation of a former one. *Binford v. Alston*, 4 Dev., 351.

7. Where a *sci. fa.* to revive a judgment issues against three and only two are summoned, the plaintiff may have execution against those two, when it is admitted that the third is insolvent and has moved out of the State. *Ibid.*

8. If a *sci. fa.* be sued out upon a judgment of more than ten years' standing, without motion, supported by an affidavit of the debt being due, the judgment unsatisfied, and the defendant living, it may be set aside for irregularity, provided the objection be taken in the first instance, but if the defendant plead to the merits, he cannot afterwards avail himself of this irregularity. *Hinton v. Oliver*, 2 Dev. and Bat., 519.

9. Where, upon a *sci. fa.* against a sheriff, for not returning an execution in the supreme court, he pleads so as to make up an issue of fact, the court itself must decide it upon affidavits, as it has no power conferred upon it by law to summon a jury to try it. *Kea v. Melvin*, 3 Jones, 243.

See (Executors and Administrators—Of their liability to creditors, &c., 32-37.) (Pleading—Of *scire facias* and pleadings thereon.)

IV. OF TRIAL AND ITS INCIDENTS.

1. In a civil case a jury may separate, after finding a verdict, and afterwards give it. in. *Butts v. Drake*, 2 Hay., 102, (262.)

2. The court may, in its discretion, permit new witnesses to be introduced and examined before a jury, after the arguments are closed, and even after the jury has retired and afterwards come into court to ask for further instructions. This, however, ought not to be done except for good reasons shown to the court. *Parish v. Fite*, 2 Murph., 258, S. C., 1 Car. L. R., 238, (19,) S. P., *Kelly v. Goodbread*, N. C. Term, R., 28, (468.)

3. Where on a note payable to three persons the suit was brought in the name of the survivor, the court permitted the attorney in fact of the plaintiff of record to dismiss the suit, though it was alleged and offered to be proved that the beneficial in-

terest was really in another person. *Jones v. Blackledge*, 2 Car. L. R., 457, (342.)

4. A court of law cannot look into the *equitable* claim of persons, who are or are not parties, but must dispose of each case as the rules of law direct. *Hence*, a release from an equitable assignee of a bond shall not be admitted to defeat a suit in the name of the legal owner of the bond. *Arrington v. Horne*, 2 Car. L. R., 631, (435.)

5. A verdict, which finds a fact contrary to a legal presumption, is to be disregarded as a nullity. *Tate v. Southard*, 1 Hawks, 45.

6. The acts of 1817 and 1820, authorizing joint actions to be brought against the obligors and endorsers of bonds, &c., did not prevent defendants from demanding separate trials; but application for that purpose should be made at an early stage of the cause, and comes too late when the cause is called for trial. *Anderson v. Hunt*, 1 Dev., 298. (These acts are superseded; see Rev. Code, ch. 13, sec. 10.)

7. Where an agreement was made that one of two similar suits should abide the event of the other, *it was held*, upon a dispute as to the terms of that agreement, that the decision of the judge of the superior court thereon was conclusive, and a judgment according to the facts ascertained by him was affirmed. *State Bank v. Knox*, 2 Dev., 107.

8. When no evidence is offered on one of two counts in a declaration, and the verdict is, by mistake, entered generally upon both of them, it may be corrected by the notes of the judge. *Smith v. Norman*, 2 Dev. 496.

9. The summary proceedings authorized by the private act of 1830, ch. 68, for the relief of persons likely to be injured by the burning of the records of Hertford county, partake of the nature of proceedings in equity; and the rules of equity practice should, therefore, when practicable govern them. *Kello v. Maget*, 1 Dev. and Bat., 414.

10. In proceedings under this act to recover upon a guardian bond, it is sufficient to show that a guardian bond was given, with a penalty large enough to cover the amount claimed, and that it was executed by the defendant, without showing the names of the justices to whom it was made payable, or the exact amount of the penalty of the bond. *Ibid.*

11. After the plaintiff has been permitted to go on and prepare his case for trial, the court will not, upon the motion of the defendant, make a peremptory order for dismissing the suit, for want of a prosecution bond, but will permit the plaintiff then to prepare and file such bond. *Brittain v. Howell*, 2 Dev. and Bat., 107.

12. If, upon the pleas of non-assumpsit and the statute of limitations, the jury find both the issues in favor of the defendant,

it will be unnecessary to consider the instructions given in relation to the latter plea. *Mastin v. Waugh*, 2 Dev. and Bat. 517.

13. On the trial of a misdemeanor, the court has a discretionary power to discharge the jury, before they have returned a verdict, and to require the defendant to be again put upon his trial for the same offence. *State v. Morrison*, 3 Dev. and Bat., 115.

14. It is not the duty of the State, or of those who prosecute for it, to examine on a criminal trial all the witnesses who were present at the perpetration of the act, or all the witnesses who were sent to the grand jury. It is the province of the prosecuting officer, and not of the court, to determine who shall be examined as witnesses on the part of the State. *State v. Martin*, 2 Ired., 101.

15. The court may, on a capital trial, either sit without adjournment, or it may adjourn from one day to another within the term allotted to it; but it is not necessary to state the adjournment on the record. *Ibid.*

16. The court takes nothing for a declaration but a declaration, and takes no notice of any thing to the contrary, farther than that the knowledge of such an understanding between the parties or their attorneys, in a particular case, may induce the court, in which the suit pended, to be very liberal in allowing the attorney of the successful party to make up the record after the trial, in respect of the pleadings, as well as the other matters, so as to effectuate the justice of the case, as it appeared in truth to be on the trial. *Battle v. Howell*, 5 Ired., 378.

17. In criminal, as well as in civil cases, all the testimony on both sides should be introduced before the argument commences. After that, the parties have no right to introduce additional testimony, though the court in its discretion may permit it to be done. *State v. Rush*, 12 Ired., 382.

18. On a trial, either criminal or civil, the proper rule of practice is for the counsel of the party having the right to the conclusion to open the argument, to which the opposite counsel may reply and then the first may conclude. *State v. David*, 4 Jones, 353.

19. Counsel have no right, in the trial of a cause, to read a statement of facts contained in the report of a former trial of the same case in the supreme court, for the purpose of contrasting such statement with the testimony of the witnesses given on the trial then pending. *State v. Whit*, 5 Jones, 224.

20. Where the judge in the progress of the trial had promised the prisoner's counsel that a person, who had been introduced as a state's witness, might be recalled as such, should the counsel find it necessary, *it was held* that the judge might retract the promise, should he find that the prisoner's counsel intended to

use it for the purpose of obtaining an unfair advantage over the counsel for the State. *Ibid.*

See (Executors and Administrators—Of their liability to creditors, &c., 31.)

V. OF DEFAULT AND ENQUIRY.

1. Upon a default and enquiry in a suit upon a note, the defendant will not be allowed to prove that the note was given without consideration, to lessen the amount of the damages. *Anonymous*, 2 Hay., 34, (195.)

2. After judgment by default in an action of covenant, defendant cannot, in the execution of a writ of enquiry, give in evidence a counter agreement signed by the plaintiff, to make deductions on the happening of certain events, which, it is alleged, have taken place. *Templeton v. Pearse*, 2 Hay., 339, (517.)

3. A default will be set aside where it was caused by a mistake, and the party probably has merits. *Andrews v. Davane*, 2 Hay., 373, (570.)

4. But not where it has been caused by the forgetfulness of of the defendant's attorney. *House v. Bryant*, 2 Hay., 374, (571.)

5. Where the defendant's attorney informed the attorney for the plaintiff, that he should file a plea in abatement and then, failed to do so, the plaintiff at the succeeding term was allowed to enter judgment as of last term, and execute his writ of enquiry *instantanter*. *Henderson v. Scurlock*, Tay., 307, (133.)

6. A default should not be set aside at the third term after it was taken, nor without imposing on the defendant the usual terms, of entering only such pleas as will bring forward the merits of the case. *Alston v. Parish*, Conf. Rep., 91, (221.)

7. If, after a judgment by default and enquiry awarded, the defendant die, the plaintiff cannot proceed with his enquiry without reviving the suit against the defendant's representatives. *Colson v. Wade*, 1 Murph., 43.

8. The courts will order a writ of enquiry in all cases where convenience and justice require it. *Key v. Allen*, Murph., 523.

9. Where the defendant has needlessly neglected his case so that a default has been entered against him, and then employs an attorney who does not practice in the court where it is pending, the default shall not be set aside. *Cogdell v. Barfield*, 2 Hawks, 332.

10. There cannot properly be a final judgment by default, upon appeal from a justice, but the matter must be determined upon proofs, either by the court or by a jury. *Williams v. Beasley*, 13 Ired., 112.

11. Where a suit has commenced by a warrant before a justice, and the defendant appeals from the justice's judgment and fails

to enter pleas in the court to which the appeal is taken, a judgment final by default may be entered up without a writ of enquiry, if the claim be for a debt or sum certain. *Hoke v. Edwards*, 1 Jones, 532.

12. Where a warrant was brought before a justice upon an unliquidated account, a judgment given against the defendant, and an appeal taken to the county court, where a default was suffered, *it was held* to be erroneous to enter up a final judgment upon such default, without an enquiry of damages. *Hartsfield v. Jones*, 4 Jones, 309.

VI. APPEARANCE AND PROCEEDING AGAINST ONE OF SEVERAL DEFENDANTS.

1. If an action against two defendants on a joint contract, one of them cannot be taken; after the *pluries* writ was returned *non est inventus*, the plaintiff may proceed against the other alone. *Sherrod v. Davis*, 1 Hay., 282, (327.) S. P., *Anonymous*, 2 Hay., 70, (237.)

2. Where notice was ordered to be given to a defendant in a *certiorari*, and at the next term an attorney marked the initials of his name for the defendant, *held* that this was sufficient evidence of notice. *Anonymous*, 1 Hay., 405, (467.)

3. When process is issued against two and served on one alone, and an *alias* and a *pluries* are issued against the other and returned "not found," the first shall be permitted to plead to the action, and the plaintiff shall come to issue as to him. *Price v. Scales*, 2 Murph., 199.

4. It is not error for husband and wife to appear by "their attorney," for although they are but one person in law, the husband may appoint an attorney, who shall appear for both. *Frazier v. Felton*, 1 Hawks, 231.

5. In assuming the duty of *prochein ami* for an infant, the court should see that he is a person of responsibility, and one who has probably the interest of the infant at heart. *Howett v. Alexander*, 1 Dev., 431.

6. In an action against two, there cannot be a judgment against both for part of the demand and against one of them for the residue, but in such a case an amendment may be allowed in the supreme court upon the payment of all costs. *Weed v. Richardson*, 2 Dev. and Bat., 535.

7. Where an original process, issued against two persons, was served on one only, and judgment was, by a mistake of the sheriff in his return, or of the clerk, entered against both, the remedy for the party injured is to apply to the court in which the judgment was rendered, and have the proceedings rectified. *Otey v. Rogers*, 4 Ired., 534.

8. A paper of an attorney signed by the purchaser of a note or bond, in the name of the payee or obligee, is sufficient au-

thority, under the Rev. Code, ch. 31, sec. 57, rule 16, for an attorney at law to appear in a cause at court, although the agent has no written authority to make the power. *Johnson v. Sikes*, 4 Jones, 70.

VII. PAYMENT OF MONEY INTO COURT.

1. Where upon an action on a constable's bond, in which the breaches assigned were a failure to pay over the money collected by the officer, and a failure to collect sundry notes and accounts placed in his hands for collection, the defendant paid a certain sum into court, according to a list of notes and accounts which he had prepared, *it was held* that the money was paid into court generally, and that, while it admitted a cause of action on each breach, it left the defendant at liberty to show that the whole amount due upon all these breaches did not exceed what he had paid, and that although the list was *prima facie* evidence against him, and perhaps his sureties, of all that it admitted, it did not preclude him or them from showing that there were mistakes in it. *Governor v. Sutton*, 4 Dev. and Bat., 484.

2. The law in relation to paying money into court with its limitations and restrictions stated and explained. *Ibid.*

3. The proper course, when no tender has been made before action brought, is for the defendant to move the court that he may be permitted to pay into court the amount he admits to be due. If the plaintiff agree to receive this amount in full of his claim, the suit is at an end, and the defendant pays the costs. But if the plaintiff prefer to go on to trial, and he do not recover more than the amount so admitted and paid into court, he is liable for the costs incurred subsequently to the payment into court. *Murray v. Windley*, 7 Ired., 201.

4. In an action of assumpsit upon a store account consisting of different items, the payment of money into court, upon a particular item, admits the character in which the plaintiff sues, and the defendant's indebtedness to the extent of the amount paid in, only; but it admits nothing as to the other items of the same account, upon which the money was not paid in, so that, as to them, the defendant may deny the character in which the plaintiff sues, as well as the justness of the claim. *Brown v. Fink*, 3 Jones, 378.

5. If money be paid to a justice in a suit before him, by the defendant, and upon an appeal to court he fails to obtain a rule to have it paid into court, and that the plaintiff must take it, or proceed further in the cause at his peril, it cannot avail as a defence to the defendant. *Winningham v. Redding*, 6 Jones, 126.

6. Where a defendant in a justices' warrant, after a trial and judgment against him, but before an appeal, paid a part of the claim to the justice, who held it until the trial in the court above

took place, and then paid it to the clerk of the court, *it was held* that, under the plea of tender and refusal and always ready, the payment was unavailing. *Cope v. Bryson*, 1 Winst., 112.

7. The proper mode for a defendant to avail himself of a payment of money into court, is to obtain a rule of court permitting him to do so. *Ibid.*

8. Whether a justice can make a rule for the payment of money into his hands, which can be made available in an appellate court, *quære*. *Ibid.*

VIII. OF CONSOLIDATING SUITS.

1. Where the plaintiff sued out sixteen warrants against the defendant upon *due bills*, the highest of the warrants including only four dollars, the court, on motion, refused to consolidate the warrants, principally on account of the policy of the act against due bills. *Smith v. Howell*, N. C. Term R., 200, (633.)

2. Where a plaintiff sued out twenty-one warrants on as many bank notes, amounting in all to one hundred and four dollars, the cause of action and the ground of defence being the same in all, he was compelled by the county court upon an appeal to consolidate them. *Person v. State Bank*, 4 Hawks, 294.

3. Suits upon notes of different dates, due at different times, and payable in different rights, cannot be consolidated. *Buie v. Kelly*, 7 Jones, 266.

4. When the court directs the consolidation of suits, it can only direct the costs of the *rule* to be paid by the plaintiff, leaving the general costs to abide the result of the suit. *Ibid.*

IX. REFERENCES, MOTIONS, ORDERS, RULES AND NOTICES.

1. A deed, produced under a *subpoena duces tecum*, was left after the trial among the papers in the clerk's office: *held* that it was subject to the control of the party producing it. *Carter v. Graves*, 1 Dev. 74.

2. After an appeal to the supreme court, the superior court can make no further order in the cause, unless a *venire de novo* be awarded by the former court. *State Bank v. Twitty*, 2 Dev., 386.

3. When an order is made in a suit pending in court, that a notice shall issue to one of the parties, the clerk is not bound to issue it, unless it be applied for in behalf of the person who obtained the order. *State v. Wood*, 3 Ired., 23.

4. A motion to non-suit a plaintiff for not producing books or papers, according to the provisions of the Rev. Stat., ch. 31, sec. 86, cannot be made, unless a previous order of the court has been obtained for the production of such books and papers.

Graham v. Hamilton, 3 Ired., 381. (See Rev. Code, ch. 31, sec. 82.)

5. Where, in an action against an administrator, a reference for an account is made to a commissioner, and the commissioner makes a report which is confirmed, the report is conclusive and the administrator is not required to produce an outstanding judgment stated in the report, the amount of which was more than sufficient to cover the balance of the assets in his hands. *Lee v. Patrick*, 9 Ired., 135.

6. The act, Rev. Stat., ch. 31, sec. 119, authorizing references to be made in courts of law to state the accounts of administrators, executors and guardians, applies only to suits brought upon their bonds respectively; and it does not apply to suits, brought upon a bond given by a testator or intestate in which fully administered is pleaded. *Lynch v. Johnson*, 11 Ired., 224. (See Code, ch. 31, sec. 114.)

7. A reference to the clerk of the court to take and report the accounts of an executor, administrator or guardian, can only be made under the act, Rev. Stat., ch. 31, sec. 119, in a suit brought upon the bond given by such executor, administrator or guardian for the faithful performance of his duty. *Anderson v. Jernigan*, 11 Ired., 414. (It matters not now whether the action be brought against the executor, &c., or on his bond. See Rev. Code, ch. 31, sec. 114.)

8. Where a rule or order is entered on the record by a proper officer of the court, in the clerk's office, but during term time, and the court meets and sits afterwards, the conclusion of law is, that it was recognized and adopted by the court. *Wood v. Bagley*, 12 Ired., 83.

9. In an action upon a bond the court, on affidavit that the bond is believed to be a forgery, may, at the appearance term, under the act, Rev. Stat., ch. 31, sec. 86, order the plaintiff to file the instrument for such time as the court may think proper, in the clerk's office, for the inspection of the defendant and others. *McGibhony v. Mills*, 13 Ired., 162. (See Rev. Code, ch. 31, sec. 82.)

10. A court cannot, under the act, Rev. Stat., ch. 31, sec. 86, order the production of papers by the defendant, on the application of the plaintiff, where no declaration has been filed, so that, in case the papers are not produced, the court can render judgment for the plaintiff, according to the provisions of the act. *Branson v. Fentress*, 13 Ired., 165. (See Rev. Code, ch. 31, sec. 82.)

11. Where a rule was obtained against the plaintiff in a suit at law under the act, Rev. Stat., ch. 31, sec. 86, to produce on the trial a certain letter written by the plaintiff to the defendant, and alleged by the latter to have been returned to the plaintiff, it was held that the plaintiff's affidavit, stating that he had not

seen the letter since he first sent it, that he had not knowingly destroyed it, and had made diligent search for it and could not find it, was a sufficient cause shown for its non-production, and for a discharge of the rule. *Fuller v. McMillan*, Busb., 206. (See Rev. Code, ch. 31, sec. 82.)

12. In a reference to a commissioner under the acts, Rev. Stat., ch. 31, sec. 119, and 1850, ch. 52, the court has power to make an order for the executor or administrator to be examined on oath. *Ward v. Simmons*, 1 Jones, 404. (See Rev. Code, ch. 31, sec. 114.)

13. Where a writ has issued without the plaintiff's having given a prosecution bond, the court may order one to be given afterwards instead of dismissing the suit. *Russell v. Saunders*, 3 Jones, 432.

14. The Revised Code, ch. 31, sec. 114, which authorizes a reference to the clerk to state an account, in suits on the bonds of sheriffs and other public officers, does not embrace the case of a bond given a deputy sheriff for the indemnity of his principal. *Willis v. Melvin*, 8 Jones, 62.

See (Executors and Administrators—Their liability to creditors, &c., 67.)

X. NON-SUIT AND NOLLE PROSEQUI.

1. A non-suit may be entered at any time before the verdict is recorded. *Quere. McNaughton Mosely*, 1 Hay., 331, (379.)

2. The act giving concurrent jurisdiction to the superior and county courts does not repeal that part of the act of 1777 which relates to non-suits. *Williams v. Holcombe*, 1 Car., L. R., 365, (33.) S. P., *Mera v. Scales*, 2 Hawks, 364. (For the present law, see Rev. Code, ch. 31, secs. 37 and 38.)

3. Where a plaintiff goes voluntarily into court, and enters on the record that he is non-suit, it is not a non-suit (but a *retraxit*; and he cannot appeal therefrom. *Worke v. Byers*, 3 Hawks, 228.

4. After a verdict in a cause commenced in the county court, of which a single magistrate had jurisdiction, judgment of non-suit cannot be entered, as is provided in the act of 1777, respecting suits commenced in the superior courts. *Allison v. Hancock*, 2 Dev., 296.

5. Under the acts of 1804 and 1820, the only mode of taking advantage of the want of jurisdiction in a case like that mentioned in the last paragraph, is by plea in abatement. *Ibid.*

6. It is not error in law for a judge to refuse to non-suit a plaintiff; and if the defendant relies upon the objection, he should move it in the shape of instructions to the jury. *Hatchel v. Odum*, 2 Dev. and Bat., 302.

7. Where a person is sued in the same action as executor of A, and also as administrator of B, it is irregular to enter a non-

suit, so far as he is sued in the one capacity, and a judgment against him in his other capacity. A *nolle prosequi* is the proper course. *Buie v. Buie*, 2 Ired., 87.

8. The plaintiff may enter a *nolle prosequi* as to any of the defendants in an action upon contract, at any time before final judgment, in the same manner as he is permitted to do in an action *ex delicto*. *Governor v. Welch*, 3 Ired., 249.

9. A plaintiff cannot be non-suited after a judgment by default against one of two defendants. *State v. Pool*, 5 Ired., 105.

10. Error will not lie for a refusal to non-suit, except in a few cases in which the duty is imposed by statute. *Smith v. Smith*, 8 Ired., 29.

11. Where there is an action on a bond against two obligors and a non-suit is entered as to one, this is no *retraxit* as to him. *Crawford v. Glass*, 11 Ired., 118.

12. If the court be dissatisfied with the verdict of a jury, it can only grant a new trial. It cannot, unless by the agreement of the parties, go further and direct the plaintiff to be non-suited. *Dicky v. Johnson*, 13 Ired., 450.

13. Where a rule was obtained against a plaintiff in the county court to give *oyer* of his cause of action by a specified day at the next term, *it was held* to be regular for the plaintiff to submit to a non-suit before the day assigned at the next term, and take an appeal to the superior court. *Johnson v. Murchison*, 1 Winst., 83.

14. A non-suit may be entered before the defendant's appearance, or before pleading, or at any day of continuance in the cause. *Ibid.*

See (Practice—In the Supreme Court, 63.) (Indictment—Of the trial, verdict and judgment, 24–25–55.)

XI. WRITS OF FALSE JUDGMENT, OF ERROR, AND SUPERSEDEAS.

1. A writ of false judgment is to be obtained upon affidavits, which may be opposed by affidavits on the other side. It differs from the assignment of errors. *Rhodes v. Brownlow*, 1 Hay., 16, (22.)

2. If an erroneous judgment be rendered on a plea in abatement, the defendant may either appeal from it or plead in chief; and upon a second erroneous judgment, assign errors upon the whole record. *State v. Quinnery, Tay.*, 33, (25.)

3. Writs of error must be filed fifteen days before the superior court, and the errors must be assigned at the same time. *Guion v. Shepard*, Conf. Rep., 26, (165.) (See Rev. Code, ch. 4, sec. 17.)

4. A writ of error may be granted upon notice to the attorney of the opposite party. *Leake v. Murchie*, Conf. Rep., 32, (170.)

5. Where a court does an act which is absolutely void, it may, on motion, declare the act void and vacate the proceeding.

Whitney v. Black, 2 Hawks, 179. *S. P. Pettijohn v. Beasley*, 1 Dev. and Bat., 254.

6. A superior court cannot supersede the process of an inferior court, unless the *supersedeas* be in the exercise of, and as ancillary to, its revising power. *Bank of Newbern v. Stanly*, 2 Dev., 476.

7. The applicant for a writ of error in the supreme court, with a view to reverse an error of its own, given by the Rev. Code, Code, ch. 33, sec. 19, must give bond for the performance of the judgment in double the amount of the judgment formerly rendered, or where it has been partly performed, in double the amount of the residue, and where the whole recovery has been satisfied, then a bond for securing the costs. *Thompson v. Barnett*, 6 Jones, 486.

8. Where, on a writ of error, a judgment of the county court refusing to let a party plead was reversed in the superior court for error on that account, *it was held* that the proper course was to send the case back to the county court, that the plaintiff in error might be restored to all things which he had lost; and that, therefore, it was error in the judge to permit the party to enter his pleas in the superior court. *Buchanan v. McKenzie*, 8 Jones, 91.

9. A judgment for the penalty authorized by the latter clause of the 5th section of the 29th chapter of the Revised Code, against a delinquent sheriff and his sureties, is only an incident to the main judgment against them for the sheriff's default, authorized by the former part of the same section; and, upon reversal for error of the latter judgment, the former must be reversed with it. *Buchanan v. McKenzie*, 8 Jones, 93.

XII. DISMISSING A SUIT.

1. Where no declaration was filed by the plaintiff, nor plea by the defendant, at the first term of the county court, the court may, at its discretion, refuse a motion to dismiss at the second term, and permit a declaration to be then filed under the act of 1786. (Ch. 253, sec. 6, of the R. C. of 1820.) (1 Rev. Stat., ch. 31, sec. 62, Rev. Code, ch. 31, sec. 57.) *Anderson v. Anderson*, Mar., 19, (3.)

2. After a plea in chief, the court will not dismiss a suit for the want of a declaration, under the act of 1786. (Rev. Code, ch. 31, sec. 57.) *Dalzell v. Stanly*, Mar., 46, (40.)

3. The court cannot dismiss a suit under the act of 1826, unless it appear *from the writ and declaration* that the sum demanded is less than one hundred dollars. The verdict of the jury finding a less sum to be due does not fall within that act. *Clark v. Cameron*, 4 Ired., 161. (See Rev. Code, ch. 31, sec. 38.)

4. There is no error in a court not to dismiss a suit for the

want of a prosecution bond, when the defendant made no motion to dismiss it. *State v. Cox*, 1 Jones, 373.

XIII. DISCONTINUANCE—DEATH OF PARTIES.

1. Where there were five defendants in trespass, and four had been taken and pleaded to issue, and the process had not been continued against the others for several terms, *it was held* to be a discontinuance of the cause. *Cobbs v. Fowler*, 1 Hay., 12, (16.)

2. Where the defendant dies, there must be a *sci. fa.* against the executors to make them parties: but where the plaintiff dies there need be no *sci. fa.*, for the defendant is continued in court two terms by the act (Rev. Code, 1 sec. 1,) and the court will permit the executors to come in and be made parties without process. *Anonymous*, 1 Hay., 455, (524.)

3. If, after a judgment against him, the defendant comes in to court at a subsequent term and procures the judgment to be set aside, and pleads to the action, and a verdict is subsequently rendered against him, it is no discontinuance of the action of which he can take advantage; and if it were a discontinuance, it would be cured by the verdict under our act of amendments. *Horah v. Long*, 4 Dev. and Bat., 275. (See Rev. Code, ch. 3, sec. 5.)

4. Where there were several defendants, and the process was served upon a part only, and not run out to a *pluries* as to the others, and a declaration accepted by those on whom process had been executed and pleas entered for them, and when the cause came on for trial the defendants insisted that it was discontinued, and at the same time the plaintiff moved to enter a *nolle prosequi* as to those not taken, which was granted, *it was held* that this prevented the discontinuance of the cause as to those on whom the process had been executed. *Governor v. Welch*, 3 Ired., 249.

5. Where there are several defendants, and the process is executed on a part only, and not run out against the others, this *may* amount to a discontinuance, but after verdict the error is cured by the statute of amendments. *Ibid.*

6. Where a writ in slander was issued returnable to a certain term, and no *alias* issued from such return term, but a writ was issued from the next term thereafter, *it was held* that the suit was discontinued, and the latter writ was the commencement of the suit, to which the statute of limitations had reference. *Hanna v. Ingram*, 8 Jones, 55, S. P. *Fulbright v. Tritt*, 2 Dev. and Bat., 491.

XIV. COSTS.

1. The plaintiff may be allowed costs for two witnesses not sworn, when it appeared that the defendant had summoned a

witness who did not attend; for the plaintiff's witness may have been summoned to counteract his testimony, and not to prove a fact for which two other witnesses had been summoned and examined. *Hayle v. Cowan*, 1 Hay., 21, (29.)

2. On the abatement of a suit by the death of a plaintiff, execution for the costs ought not to be issued, until a *sci. fa.* has issued to the representatives of the plaintiff. *Simmons v. Ratcliff*, 1 Murph., 113. S. C., 2 Hay., 341, (521.)

3. Witness tickets, which have been omitted in a former taxation of costs, may, on motion and after notice, be ordered to be charged and execution to issue therefor. *Tate v. Kincaid*, 2 Hawks, 334.

4. If there be judgment in the court below that the suit had abated, and the administrator of the plaintiff appeal to the supreme court, and then dismiss the appeal, he shall be ordered to pay the costs of the supreme court, and each party will be ordered to pay his own costs in the court below. *Collins v. Jones*, 3 Hawks, 25.

5. If judgment be arrested in the supreme court, the court below can only collect the costs incurred there. *State Bank v. Twitty*, 2 Dev., 386.

6. One who sues *in forma pauperis* neither pays nor receives costs. *Clark v. Dupree*, 2 Dev., 411.

7. An order that a plaintiff may sue *in forma pauperis* extends only to the court in which it was made. Therefore, if such an order be made in the county court, and the cause is afterwards brought to the superior court, and the order is not renewed there, the defendant, if he succeed, will recover the costs of that court. *Ibid.*

8. Under the acts of 1790 and 1798, for correcting errors in patents, &c., persons, who appear in court and act as parties defendant, may, in case the petitioner succeeds, be adjudged to pay costs, though they have not regularly made themselves parties by a rule of court. *Jones v. Physioc*, 1 Dev. and Bat., 173. (See Rev. Code, ch. 42, sec. 28.)

9. If the petitioner, under the acts mentioned in the last paragraph, procure subpoenas and copies of his petition to be served on the persons to be notified, it must be at his own costs, as they are not required to be made parties by the petitioner. *Ibid.*

10. Where a rule was obtained in the county court upon a defendant in ejectment to give security for costs, upon pain of having a judgment by default against the casual ejector, and at the same term the plaintiff submitted to a judgment of non-suit and appealed, *it was held* that the superior court could not notice the rule by giving a judgment to enforce it. *Granberry v. Newby*, 7 Jones, 422.

11. Where a judge in the superior court made the following order: "verdict set aside and new trial granted on paying the

costs of this court:" *it was held* that the payment of the costs was not a condition precedent to the new trial; but the failure of the court to revoke the order during the term, and to give judgment on the verdict, gave the new trial absolutely. *Rodgers v. Cherry*, 7 Jones, 539.

12. Where a judge at one term granted a new trial, and made a rule on the plaintiff to "give security on or before Monday of the next term, or the suit will be dismissed," *it was held* that at the next term, the judge then presiding might extend the rule, so as to allow the plaintiff to give security on a subsequent day of the term. *Ibid.*

XV. JUDGE'S CHARGE.

1. Under the act of 1796, a judge may say to a jury that a particular fact is *proved*, if the jury believe the witness who deposes to it. If a witness is shown to be a minister of the gospel, that fact may be properly mentioned to the jury; but it does not *necessarily* entitle his testimony to more weight than that of another man. *Sneed v. Creath*, 1 Hawks, 309.

2. The intimation of the judge's opinion to the jury, upon a question of fact, is ground for a new trial; and the enumeration to the jury of a variety of circumstances, detailed in evidence, with a declaration that such circumstances are badges of fraud, and accompanied with the remark that "it is for the jury to enquire how it is possible for the circumstances to have existed without fraud," is too plain an intimation of the judge's opinion, as to the fraudulent nature of the circumstances. *Reel v. Reel*, 2 Hawks, 63.

3. A judge should not charge a jury upon a point upon which no testimony has been offered, though requested to do so. *Freeman v. Edmunds*, 3 Hawks, 5.

4. A judge is not bound to charge upon all the points in a case; he may be silent, unless called on by one of the parties to give his opinion on a question of law; but where he passes over one point which is preliminary to get at another, which could not fairly arise until the first is disposed of, it is error. *McNeill v. Massey*, 3 Hawks, 91.

5. A judge is not bound to recapitulate all the evidence in his charge to the jury, that being a matter left to his own discretion; but if, however, he deliver a charge, he must do so according to the rule prescribed in the act of 1796. *State v. Morris*, 3 Hawks, 388. (See Rev. Code, ch. 31, sec. 130.)

6. The charge of a judge should be judged of by its general scope and spirit, disregarding hypercritical niceties. When, therefore, in an action for an assault, the jury were told to imagine themselves placed in a situation similar to that of the plaintiff, and to give him such sum as they would be willing to take

as a compensation for the injury, the language is not to be understood literally, but only as admonitory to the jury to regard not merely the wrong sustained by the plaintiff, but the provocation he had given, the effect produced on him, the ability of the defendant to pay, and to estimate the damages upon a view of all these circumstances. *Paschall v. Williams*, 4 Hawks, 292.

7. A judge has no right to tell a jury how much weight is to be given to testimony, but it is his duty to inform them when it weighs nothing at all. *Reed v. Schenck*, 2 Dev., 415.

8. Under the act of 1796, it is the duty of the judge to recapitulate the testimony, in such a manner as will divest it of immaterial circumstances, and present it fairly and impartially before the jury. *State v. Moses*, 2 Dev., 452.

9. The weight of the testimony is exclusively within the province of the jury; but its *nature, relevancy and tendency*, it is the duty of the judge to explain. *Ibid.*

10. The judge in his charge is not confined to the words spoken by the witnesses, but he may state all the circumstances attending the examination, to show how they are contradictory, and how reconcilable, and thence to submit a reasonable inference which may be drawn. Thus, where a witness testified that, at the distance of ten paces in a dark night, he saw the prisoner pull the trigger of a gun, and the judge informed the jury, that if they believed the witness to mean that by the flash of the gun he saw the prisoner's hand upon the trigger, that would explain the apparent contradiction, *it was held* that the judge by such an instruction did not transgress the limits of his duty. *Ibid.*

11. If a judge, in his charge to the jury, present only the inferences that can be drawn on one side, arrayed *in solido* so as to constitute an imposing argument to the jury, without summing up on the other side, it is an evasion of the statute. *Ibid.*

12. The judge is not bound, in summing up, to notice every position discussed by the counsel. If any thing deemed material be omitted, the counsel can call the attention of the court to it and pray an instruction; and then a refusal would be error, though an omission would not. *Simpson v. Blount*, 3 Dev., 34.

13. In mixed questions of law and fact, a judge is not bound to charge the jury upon a supposed state of facts, unless moved to do so. *Governor v. Carroway*, 3 Dev., 436.

14. Where a judge, in his charge, did not repeat all the evidence, but only such parts as he thought would aid the jury in finding their verdict, *it was held* to be correct. *State v. Lipsey*, 3 Dev., 485.

15. That a part of the act of 1796, directing the conduct of judges in charging juries, which forbids a judge to express his opinion as to the weight of evidence, introduces a new rule. The other part, directing him to state to the jury the facts given

in evidence, is declaratory that his discretion in that respect was not affected by the prohibitory clause. *Ibid.*

16. Where general instructions are given to a jury that, upon the whole case as appearing upon the evidence, the plaintiff is entitled to recover, if there be any defect in the title of the plaintiff upon any grounds, the instructions are erroneous. *Paul v. Ward*, 4 Dev., 247.

17. It is erroneous for a judge to undertake to decide on facts and inferences which ought properly to be left to the jury. *White v. White*, 4 Dev., 257.

18. Where a judge decides upon a question, as being one of law, when it is really one of fact and should be submitted to the jury, it is competent for him afterwards to correct his mistake, and submit the matter to the jury. *State v. May*, 4 Dev., 328.

19. Where upon the trial of an indictment for arson, the evidence was, that the prisoner had in his possession bank notes similar to some stolen from the house where the arson was committed, and that he gave contradictory accounts of the mode in which he obtained them, a charge to the jury that these contradictions were evidence tending to prove that he did not come honestly by them, and hence tending to establish his guilt, *was held* not to be erroneous. *State v. Gillis*, 4 Dev., 606.

20. A judge may, in his charge, tell the jury that "a witness had given a fair and candid statement, and appeared to be a creditable man," the statement having been admitted to be correct. *State v. Davis*, 4 Dev., 612.

21. If a judge leave it to the jury to presume a deed from length of possession and other circumstances, without stating particularly the weight which the law attaches to each circumstance, as tending to establish or rebut the presumption, it is not erroneous, unless such particular instruction be prayed and refused. *Jackson v. Commissioners of Hillsborough*, 1 Dev. and Bat., 177.

22. Where the general doctrines and rules contained in a judge's charge are correct, and there appear no special circumstances requiring a modification of them, and the party excepting has called for no special instructions which have been denied, an exception to the charge cannot be sustained. *McRae v. Evans*, 1 Dev. and Bat., 243.

23. When a controversy turns upon the question, whether certain slaves, which were put into the possession of a daughter upon her marriage, were intended as a gift or a loan, and there was no written evidence of the transaction, and no precise formula was stated by any witness to have been used in it, it is not erroneous in the judge to leave the case to the jury to decide, upon all the evidence, whether a gift or a loan was intended. *Torrence v. Graham*, 1 Dev. and Bat., 284.

24. Where a submission to arbitration was by parol, and the

award of the arbitrators was also unwritten, it is not error in the judge to leave it to the jury to decide upon the testimony, what was the true question submitted, and what was the real question decided in the award, and then to instruct them what would be the law, according as their finding might be the one way or the other. *Ibid.*

25. Where the intent, with which the delivery of a slave was made, becomes important, in a contest about the sale of the slave, the circumstances evincing that intent, one way or the other, should be left to the jury; and in such case, it would be error in the court to pronounce that the fact of sale is proved or disproved. *Henry v. Patrick*, 1 Dev. and Bat., 358.

26. Where the defence of a person indicted for murder, as disclosed by his witnesses, consists of a justification, and the judge, in his charge, takes it for granted that the homicide was committed by him, he does not thereby violate the act of assembly which forbids the expression of his opinion as to the weight of evidence, because the justification necessarily admits the homicide, and its validity cannot be examined, except upon the supposition that the homicide was committed by him who seeks to justify it. *State v. Miller*, 1 Dev. and Bat., 500.

27. A charge to the jury that they were bound to believe a witness, who was uncontradicted and unimpeached, whose story was credible, and in whose manner there was nothing to shake their confidence, is erroneous; because, from his connection with the parties, or the subject in controversy and other similar circumstances, they might properly disbelieve him. *Noland v. McCracken*, 1 Dev. and Bat., 594.

28. It is not error for a judge to omit remarking upon a part of the testimony, if no particular charge in relation to it be prayed. *State v. Scott*, 2 Dev. and Bat., 35.

29. A judge, in his charge to the jury, should not instruct them upon a statement purely hypothetical. *State v. Benton*, 2 Dev. and Bat., 196.

30. A judge is not bound to recapitulate all the evidence to the jury; it is sufficient for him to direct their attention to the principal questions which they have to investigate, and to explain the law applicable to the case: and this particularly, when he is not called upon by the counsel to give a fuller charge. *State v. Haney*, 2 Dev. and Bat., 390.

31. A refusal of the judge to give a more specific instruction asked by a party, to which he is entitled, may constitute error, but a mere omission to do so, when not asked, does not. *Brown v. Morris*, 4 Dev. and Bat., 429.

32. Where the judge, after reciting all the testimony relating to a material enquiry of fact in the cause, asked the jury if they found in this testimony, or could lay their fingers on any part of it, showing the fact, the question, unless proposed in such a tone

and manner as to manifest the clear conviction of the enquirer how it ought to be answered, which will not be intended, is not an expression of opinion on the facts to the jury, but only very properly directs their attention to a material enquiry of fact. *McRae v. Lilly*, 1 Ired., 118.

33. The court must in every case pronounce whether the evidence corresponds with the allegations on the record. *Walker v. Baxter*, 1 Ired., 213.

34. The court ought never to instruct a jury as to the legal effect of supposed facts, which the jury cannot find. *Ibid.*

35. It is the duty of the judge, who presides at the trial of any cause whether civil or criminal, to correct any misrepresentation of law made to the jury, although admitted to be law by the parties or their counsel. *State v. Johnson*, 1 Ired., 354.

36. Although it is not easy in practice to draw the boundary line between a defect of evidence and evidence confessedly slight, yet, where no part of the testimony offered can fairly warrant the inference of the fact in issue, or furnish more than materials for a mere guess or conjecture thereon, it will be error in the charge of the court to leave it to the jury to infer the fact from such testimony. *Cobb v. Fogleman*, 1 Ired., 440.

37. Where the jury find for the defendant upon the general issue in a cause, the supreme court will not enquire into the correctness of the judge's charge upon the statute of limitations. *Cole v. Cole*, 1 Ired., 460.

38. Where there is no proof to establish a fact relied on, the jury should be so instructed by the court. *Redman v. Roberts*, 1 Ired 479, S. P., *Rowland v. Rowland*, 2 Ired., 61.

39. The court is not bound to lay down to the jury an abstract proposition, but only to state the law as applicable to the evidence introduced. *State v. Martin*, 2 Ired., 101.

40. It is erroneous in the charge of a judge, for him to leave a material fact alleged in the plaintiff's declaration to the jury, when there is no evidence to support it. *Jones v. Eason*, 2 Ired., 331.

40. When, from the circumstances proved in a case, a reasonable suspicion or presumption of a fact may be inferred, although the court might think the jury well justified in not inferring such fact, yet it is not error for the judge in his charge to submit the matter to the jury to be passed upon by them. *Blackledge v. Clark*, 2 Ired., 394.

41. The language of a judge in his charge to the jury is to be read with reference to the evidence and the points disputed at the trial, and of course, is to be construed with the context. *State v. Tilly*, 3 Ired., 424.

42. The judge should not charge the jury upon a supposed state of facts, which does not appear in the evidence. *Pollard v. Teel*, 3 Ired., 470.

43. Where a prisoner prayed for instructions only on the ground that the deceased did intend to kill him, and not on the ground of a reasonable belief on his part that the deceased did so intend, the judge did not err in omitting to instruct the jury on the latter point. *State v. Scott*, 4 Ired., 409.

44. A judge's charge is erroneous, which declines to advise the jury unequivocally, as to the proper construction of a will, when upon such construction a material question in the cause necessarily arose. *Green v. Collins*, 6 Ired., 139.

45. The act, restraining judges from expressing to the jury an opinion as to the "facts" of the case, only applies to those "facts" respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendant depends. *State v. Angel*, 7 Ired., 27. (See Rev. Code, ch. 31, sec. 130.)

46. There is no obligation on a judge to interrupt counsel in stating their conclusions either of law or of fact. It is, indeed, the right and duty of the presiding judge, if counsel state facts as proved, upon which no evidence has been given, to correct the mistake, and he may do it at the moment, or wait till he charges the jury, which is, perhaps, the most appropriate time. *State v. O'Neal*, 7 Ired., 251.

47. An omission on the part of the judge to instruct the jury on a particular point, if no instruction be asked from him on that point, is not error. *Ibid.*

48. Where a judge told the jury in his charge, that they must find for one of the parties, unless they believed his witness had committed perjury, the charge was erroneous, because the credit of the witness was a matter for the jury and not for the court, and the witness might have been mistaken and not guilty of perjury. *State v. Thomas*, 7 Ired., 381.

49. It is never the duty of a judge to charge the jury upon a fact purely hypothetical; and if he do, it is an error which must be corrected, if it act to the prejudice of an accused party; and it is one against which the judge ought to guard, as it is irremediable if it be calculated to prejudice the prosecution. *State v. Collins*, 8 Ired., 407.

50. Where the judge charges, in an action for work and labor done, that work done on the land of the hirer "was necessarily beneficial," he erred if he stated that as a principle of law, and he also erred if he stated it as a matter of fact, because he had no right to give his opinion upon a matter of fact. *Dover v. Plemmons*, 10 Ired., 23.

51. Although a judge is not required to respond in the very words of an instruction prayed for by counsel, yet it is error if he do not substantially meet the matter of law, and put the matter of fact directly to the jury. *Commissioners of Newbern v. Dawson*, 10 Ired., 436.

52. Although it be not error to refrain from giving instructions unless they be asked for, yet the judge, when he does give instructions, either of his own motion or at the instance of a party, should give them in such a way, that they be not in themselves erroneous, or so framed as to mislead the jury. *Bynum v. Bynum*, 11 Ired., 632.

53. An *omission* by a judge to instruct the jury upon a particular point is not error. If the party deeming them material ask for instructions, and they are improperly granted or refused, the question may be brought before the supreme court for review. *Arey v. Stephenson*, 12 Ired., 34.

54. A judge may correct a slip, by withdrawing improper evidence from the consideration of the jury, or by giving such explanations of an error, as will prevent it from misleading a jury. *McAllister v. McAllister*, 12 Ired., 184.

55. If a judge omit to charge upon a point presented by the evidence, it is no error, unless he has been requested to give the charge. But if he make a charge against law, it is error unless it be upon a mere abstract proposition, and it is apparent upon the whole case that it could not have misled the jury. *Hice v. Woodard*, 12 Ired., 293.

56. A judge is never bound to instruct a jury upon an abstract proposition. His duty is to lay down the law to them, as applicable to the evidence introduced. *State v. Rush*, 12 Ired., 382.

57. It never can be error in a judge to assume that as true, which the prisoner, in his defence, has treated as true; as where a prisoner indicted for murder does not pretend that, if guilty of the homicide, he is guilty of any thing but murder, but relies, in his defence, solely upon the ground that he was not guilty of the homicide. *Ibid.*

58. It is not error in the judge to tell the jury that if a witness is credible it is their duty to believe him, when he adds at the same time, "yet it is possible the witness may be mistaken or perjured." *Ibid.*

59. It is not error in a judge to instruct the jury that "all the circumstances for and against the prisoner, which were proved beyond a reasonable doubt, must be taken together and not separately." *Ibid.*

60. It is the duty of a judge, when he does charge upon evidence, to collate it and bring it together in one view on each side, with such remarks and illustrations as may properly direct the attention of the jury to the merits of the case. It is also his duty to bring to the notice of the jury principles of law or facts, which have an important bearing upon the case, though omitted in the argument of counsel. *Bailey v. Poole*, 13 Ired., 404.

61. When there is no proof to establish a fact, the jury should be so instructed; and it is not the duty of the judge to state to

them an abstract proposition, but to state the law as applicable to the facts proved. *Brown v. Patton*, 13 Ired., 446.

62. It is error in a judge to tell a jury, in his charge, that from the testimony of A B, the prosecutor, and from the nature of the testimony otherwise, it was *not possible* for the witness innocently to be in error; and that it was, therefore, a question of guilt on the one hand, or corrupt false swearing on the other. *State v. Presley*, 13 Ired., 494.

63. Whenever, in the trial of a cause, a point arises, which it is important to either party to sustain, and there is no evidence offered upon it, it is the duty of the judge so to instruct the jury. Therefore, where, upon a question of fraud, the plaintiff put in evidence certain bonds having no subscribing witness, to show the consideration for the bill of sale under which he claimed, and it did not appear that the bonds were ever seen by any one before the trial, *it was held* to be no violation of the act, Rev. Stat., ch. 31, sec. 136, for the judge to charge the jury that "the existence of the said bonds was unknown to any one, except the parties, until they were produced upon the trial." *Satherwhite v. Hicks*, Busb., 105. (See Rev. Code, ch. 31, sec. 130.)

64. In an indictment for obstructing a highway, where the question was whether the same had been used as a public highway or not, and there was a conflict of testimony between the witnesses for the State and those for the defendant as to that fact, the judge charged the jury that "if the evidence offered in the case satisfied them, that the road had been used as a public highway for twenty years, they were at liberty to presume that the said road had been established as a public highway," and in that case the defendant was guilty, and declined to charge as asked for by the defendant, that if the road had been used in no other manner than as described by the defendant's witnesses, the jury were *not* at liberty to infer its establishment as a public road. *Held* that such charge was a violation of the act of 1796. *State v. Cardwell*, Busb., 245. (See Rev. Code, ch. 31, sec. 130.)

65. The court should never give instructions to the jury upon a state of facts not presented by the evidence. *State v. Peace*, 1 Jones, 251.

66. If a judge, in his charge to the jury, say that a book on farriery, which had been referred to and commented on by counsel, was entitled to as much authority as a witness who had been examined, as an *expert*, on the diseases of horses, it is a clear violation of the act of 1796, which forbids a judge from expressing an opinion on the facts. *Melvin v. Easley*, 1 Jones, 386.

67. It is error for a judge, in his charge, to submit a material question of fact to the jury upon which there is no evidence. *Barnett v. Fulton*, 1 Jones, 543.

68. It is no violation of the act of 1796 for the judge to speak

of facts, in his charge, which are not questioned by either party. *State v. Williams*, 2 Jones, 194.

69. It is no error in a judge to decline stating what the law is upon facts as to which there is no evidence in the cause. *State v. Cain*, 2 Jones, 201.

70. Where a simple enumeration of circumstances leads to an irresistible conclusion of fact, the judge cannot be considered as expressing an opinion as to such fact by making such enumeration, when there is no peculiar significancy given to it by the tone of his voice, or his manner of making it. *State v. Noblett*, 2 Jones, 418.

71. Where a judge, in the trial of a cause, undertook to state to the jury the remark of counsel on one side, and did so in such strong and emphatic language, as to give additional force to the counsel's positions, and afterwards said to the jury that it is a plain case, and that if they did not agree he would detain them until Saturday night, *it was held* that this was such a *leading* of the jury to a particular conclusion as to amount to a violation of the act of 1796. *Nash v. Morton*, 3 Jones, 3.

72. Where there is *any evidence* tending to prove a fact in the cause, a judge has no right to tell the jury, that it is not sufficient to warrant them in finding the fact; but if there be *no evidence*, he may tell them there is none. *Wells v. Clements*, 3 Jones, 168.

73. If the charge of the judge be not so accurate as it might have been, yet if his attention were not called to the supposed inaccuracy at the time, and it were not calculated to mislead the jury, it furnishes no ground for an exception. *Ray v. Lipscomb*, 3 Jones, 185.

74. If a judge, in charging a jury in a case of homicide, lay down a series of propositions, some of which are not strictly applicable to the facts of the case, and there be error therein, which, however, is corrected in a part of the same charge, in applying those propositions to the facts, it cannot be deemed error. *State v. Robbins*, 3 Jones, 249.

75. On a trial for murder, where it is proper to instruct the jury that they must be satisfied beyond a reasonable doubt of the prisoner's guilt before they convict him, it is not error for the court to omit such instruction, if, in the argument, that rule has been properly laid down by the defendant's counsel and not denied by the counsel for the State. *State v. Johnson*, 3 Jones, 266.

76. The supreme court cannot be influenced by the complaint made by counsel of the tone and manner of the judge in charging the jury in the court below, unless the objection appear in the bill of exceptions. *Ernull v. Whitford*, 3 Jones, 474.

77. A mere omission of the judge to charge the jury on a

particular point, where no particular instructions on it have been asked, is not error. *Ward v. Herrin*, 4 Jones, 23.

78. Where special instructions are prayed, it is the duty of the court to respond, either by refusing the instructions, or by giving them; but in doing the latter the judge is not required to charge in the language prayed for, it being sufficient if the same idea is substantially conveyed. *Marshall v. Flinn*, 4 Jones, 199.

79. If a judge omit to state the testimony in his charge to the jury as fully as counsel may wish, it is no error where he has not been requested to do so. *Boykin v. Perry*, 4 Jones, 325.

80. A judge cannot submit a question of fact to the jury, upon which no evidence has been given. *Dula v. Cowles*, 4 Jones, 519.

81. In stating a view of the testimony as an alternative for one supposed to be rejected, because the testimony presenting it was discredited, it is error in the charge so to state it as to leave the jury the right to take into consideration the discredited testimony. *State v. Harrison*, 5 Jones, 115.

82. Unless there be some good reason given by counsel why the judge should comment on the testimony of a particular witness, he may properly decline to do so. *Findly v. Ray*, 5 Jones, 125.

83. Where, in the course of a long trial, a point upon which the court had been requested to charge was forgotten, but at the end of his charge the judge asked the counsel on both sides if there were any other matters upon which they wished instructions, to which they both answered in the negative, *it was held* that the omission could not be made the ground of exception. *Gillespie v. Shuliberrier*, 5 Jones, 157.

84. Where an instruction is asked in such a manner as to assume impliedly a fact not proved, the judge may rightfully refuse to give it. *Chaffin v. Lawrence*, 5 Jones, 179.

85. It is not giving undue weight to the statement of a witness for the judge, in his charge, to make an explanation protecting him from unjust animadversions of counsel, especially where the erroneous decision of the court afforded the occasion for such animadversions. *State v. Whit*, 5 Jones, 224.

86. Where evidence was given to the court, in the presence of the jury, of confessions illegally obtained, and afterwards the judge rehearsed the evidence thus given for the purpose of cautioning the jury against permitting it to have any effect upon their minds, except to weaken the force of the confessions subsequently made, *it was held* to be no error of which the prisoner could complain. *State v. Gregory*, 5 Jones, 315.

87. The charge of a judge will be erroneous when the case is presented to the jury in an aspect not warranted by the testimony, and he lays down a principle of law in relation thereto

which may have misled the jury. *Smith v. Sasser*, 5 Jones, 388.

88. When a judge in his charge asks with emphasis, and in animated tones, *where was the evidence to establish a particular fact*, it will be taken that he means to assert that there is no such evidence. *State v. Simmons*, 6 Jones, 21.

89. Whenever a judge is called upon to charge upon a distinct point of law, it is his duty to do so explicitly, and it is erroneous for him to mix it up, in his instructions, indistinctly with other points of the case, or to leave his opinion on the point in question to be gathered from inference. *George v. Smith*, 6 Jones, 273.

90. The supreme court cannot take notice of a bill of exceptions made out and filed by the counsel of one of the parties, without the sanction of the judge who presided at the trial. *State v. Hart*, 6 Jones, 389.

91. It is erroneous for a judge on a trial for murder to make a hypothesis omitting a material fact, which is in favor of the prisoner. *State v. Floyd*, 6 Jones, 392.

92. Where an instruction prayed for by counsel is substantially given in the judge's charge, it is sufficient. *Burton v. March*, 6 Jones, 409.

93. Where a judge substantially gives an instruction to which a party is entitled, he may properly refuse to give the same instruction in a different form. *State v. Neville*, 6 Jones, 423.

94. Where counsel asks of the court an instruction which the case shows is proper, it is error not to give it. *State v. Christmas*, 6 Jones, 471.

95. It is error in the judge to submit to the jury a hypothesis as to the motives of the prisoner in striking a fatal blow, without sufficient evidence to justify it. *State v. Sizemore*, 7 Jones, 206.

96. A judge's charge, which leaves a question of fact to the jury without any evidence tending to support it, is erroneous. *Bond v. Hall*, 8 Jones, 14.

97. A judge cannot be required to charge a jury upon an assumption of facts not supported by the testimony. *State v. Clara*, 8 Jones, 25.

98. Where there are several possibilities of fact different from the inference sought to be drawn by the opposite party from the evidence offered, a judge is not bound to bring one such possibility only to the special attention of the jury. *Ibid.*

99. The judge is not bound to give special instructions to the jury, at the request of the counsel, on a hypothetical case. *State v. Murph*, 1 Winst., 129.

100. Where there is a conflict of testimony, which leaves a case in doubt before a jury, it is error for the judge, in his instructions, to use language which may be subject to misapprehension, and is calculated to mislead the jury. *State v. Bailey*, 1 Winst., 137.

101. It cannot be assigned for error that the judge did not charge the jury upon a point, which the counsel for the party did not make at the trial. *Higdon v. Chastaine*, 1 Winst., 212.

102. Where testimony is direct, leaving nothing to inference, and if believed, is the same thing as the fact sought to be proved, the judge is at liberty to instruct the jury that, if they believe the witness, they may find for the plaintiff, or the defendant. But this is not allowed where the evidence is circumstantial, or where the evidence offered on the other side tends to explain it, or to rebut the inferences sought to be drawn from it, or to contradict the witnesses. *Gaither v. Ferebee*, 1 Winst., 310.

103. Any remark made by a judge on the trial, from which the jury may infer what his opinion is as to the sufficiency or insufficiency of any part of the evidence pertinent to the issue, is error, and that error is not corrected by his telling the jury that it is their exclusive province to determine on the sufficiency or insufficiency of the evidence, and they are not bound by his opinion in regard thereto. *State v. Dick*, 2 Winst., 45.

104. If, on the trial of an indictment, witnesses are examined by the State, and other witnesses are examined by the accused to maintain his defence, and the judge instructs the jury that, if they believe the witnesses on either side, the accused is guilty, the supreme court must consider the charge only in its application to the evidence on the part of the accused, and must assume every thing to be proved on his part which a jury would be at liberty to infer from that evidence. *State v. Ellick*, 2 Winst., 56.

105. A judge, in his charge, is required to put the case to the jury in such a way as to make it appear by the record what facts the jury find, and what is his opinion as to the law. *State v. Summey*, 2 Winst., 108.

See (Indictment—Of the trial, verdict and judgment, 14.)

XVI. PRACTICE IN THE SUPREME COURT.

1. The statement of the case by the judge presiding in the court below, if not certified or referred to in the transcript, as part of the record, cannot be taken notice of by the supreme court; and the court upon a view of the record must pronounce the same judgment that the court below ought to have pronounced. *Rodman v. Austin*, 3 Murph., 252.

2. The supreme court is a court of errors in law, and the case stated by the judge is a substitute in our practice for a bill of exceptions. *State Bank v. Hunter*, 1 Dev., 100.

3. Where a cause is dismissed in the superior court without any apparent reasons, the supreme court will reverse the judgment and remand the cause. *State Bank v. Twitty*, 2 Dev., 176.

4. When an error was committed in engrossing the judgment of the supreme court, it must be corrected by the minutes. *State Bank v. Twitty*, 2 Dev., 386.

5. An objection, arising upon the statement of the *ore tenus* incidents of the trial, but not taken in the court below, will not be heard in the supreme court. *Atkinson v. Clarke*, 3 Dev., 171.

6. Cases stated upon an appeal to the supreme court are similar to reports on motions for a new trial in one respect, namely, that if upon the whole case it is apparent that the verdict is correct, the judgment will not be reversed, although there may be error in the point complained of. In other respects they are similar to bills of exceptions. *Ibid.*

7. Objections arising upon the pleadings, verdict and judgment, upon the record strictly speaking, may be taken for the first time in the supreme court. *Ibid.*

8. Where upon the case stated, the judgment of the court below is correct, points, which were intended to be presented, do not arise and will not be examined; as, where in trespass the plaintiff was in possession and the defendant had no title, defects in the title of the plaintiff will not be noticed, as he recovered upon his possession. *Cobb v. Herring*, 3 Dev., 382.

9. Where judgment is rendered in the court below upon a case agreed, which is so defectively stated that no judgment can be properly rendered, the supreme court will, upon appeal, reverse it. *Isbell v. Stone*, 3 Dev., 410.

10. Points which were not made on the trial, and, if taken, might then have been disposed of, will not be examined on an appeal to the supreme court. *Waller v. Mills*, 3 Dev., 515.

11. The supreme court is required to inspect the whole record of a case brought up by appeal, and must notice substantial defects in the memorandum of pleadings used in our courts; in these so much must appear, as to show with certainty on what point the issue was joined and the verdict given. *Finley v. Smith*, 4 Dev., 95.

12. Where a cause was removed, and the record certified on the removal was erroneously copied, upon advantage being taken of that error in the supreme court, the remedy is to move to stay proceedings in that court until the record of the court where the trial took place is corrected, and then to bring up that record by *certiorari*. *Ballard v. Carr*, 4 Dev., 575.

13. The supreme court has the power to make the amendment here, but it might be a question whether it should be by a *certiorari* to the court from which the record was removed for a copy to amend by, or whether it ought to be from the original. The course mentioned in the last section is the most convenient rule of practice. *Ibid.*

14. The case stated by the court below for the supreme court will always be presumed to be correct in points of fact, unless,

from an examination of the whole record, a mistake clearly appears. *Harry v. Graham*, 1 Dev. and Bat., 76.

15. Records of suits, not referred to as making any part of the case sent to the supreme court, cannot be noticed by it. *Freeman v. Grist*, 1 Dev. and Bat., 217.

16. Where it does not appear in a case that a person of the same name is the same person, the supreme court cannot presume it to be so. *Gwyn v. Wellborn*, 1 Dev. and Bat., 313.

17. The supreme court, upon an appeal, cannot consider of any objections to the record of the court below, that do not appear in the transcript sent up. *State v. Calhoon*, 1 Dev. and Bat., 374.

18. An exception, or the case stated, on an appeal to the supreme court, is there taken to be absolutely true, as to all matters which occur on the trial, or purport to have been acted in the court from which the appeal comes. But where the fact is stated as having occurred in another court, the record of that court is the only competent evidence of the fact; and no statement contrary to it can be admitted. *State v. Reid*, 1 Dev. and Bat., 377.

19. It is not competent to reverse a judgment for an abstract proposition of the judge, however erroneous; and unless the evidence be so stated as to raise the question, it is merely abstract. *State v. Hardin*, 2 Dev. and Bat., 407.

20. The supreme court cannot go out of one record into another, to find the evidence given, or the points made or decided in the former. *Ibid.*

21. An exception, which was intended to bring under a review the construction of a deed, cannot be considered, where the terms of the deed are not given in the case stated, nor the deed itself certified as a part of it. And the judgment will be affirmed, although it may not be perceived that it was right, if it do not appear to be wrong. *Brooks v. Ross*, 2 Dev. and Bat., 484.

22. Where an entry of a *nol. pros.* as to one of two defendants appears, upon the record certified to the supreme court, to have been made after the judgment below, it will, upon appeal, be taken as having been made at the proper time. *Love v. Howell*, 3 Dev. and Bat., 70.

23. Where the general issue, statute of limitations and usury are pleaded, and the jury find for the plaintiff upon the two first pleas, and for the defendant upon the the last, upon which he has judgment in his favor, the supreme cannot, on an appeal, if there were error in the charge of the judge on the last plea, refuse to reverse the judgment, upon the ground that the jury ought to have found differently on the two first pleas; because the court cannot judicially see that the finding was wrong, and if they could, the verdict, while it stands, is conclusive of the

facts which it declares, and the court have not the power to modify or alter it. *McKesson v. McDowell*, 4 Dev. and Bat., 120.

24. On appeals to the supreme court, questions of law, except such as appear on the *record* strictly so called, are not allowed to be raised in that court, which were not before the court from which the appeal was taken. The *case* made by the judge below is regarded, as nearly as possible, in the light of a bill of exceptions for specified errors. The presumption is, that whatever is not complained of was rightfully done; but this presumption cannot hold against what appears. When, by no reasonable intendment, facts can be supposed to have been shown, upon which the charge of the judge was given, and without which the charge misdirected the jury upon a question of law, presented by the pleadings and evidence, upon a matter material to the issues which they had to try, an error is presented upon a point, which, though not made in the court below, the supreme court cannot overlook. *Ring v. King*, 4 Dev. and Bat., 164.

25. Where certain facts are agreed upon for the purpose of presenting a particular question to the court, the case is not open to an objection raising another question, upon a particular fact's not appearing in the statement. *Farley v. Lea*, 4 Dev. and Bat., 169.

26. Upon a motion for a new trial and an appeal to the supreme court, every presumption is to be made in favor of the verdict of the jury, and the correctness of the instructions to the court; hence, the want of a *case* stated in the record sufficient to authorize the verdict, or give rise to the opinions delivered by the judge, does not *per se* render the judgment erroneous. It is deemed right until the contrary appear; and, therefore, the record must set out such of the proceedings at the trial as will show affirmatively that there was no error, otherwise it must necessarily be affirmed. *Honeycut v. Angel*, 4 Dev. and Bat., 306.

27. While the court upon a motion for a new trial is bound to presume every fact necessary to support a verdict, upon a motion to arrest the judgment it is restrained from presuming or admitting any matter of substance not found in the record. The plaintiff cannot have a judgment, unless he allege in his pleadings such facts as in justice and in law entitle him to it. *Ibid.*

28. If the plaintiff were bound to support the affirmative of an issue made by the pleadings, and the judge instructed the jury that the evidence offered by him was sufficient for that purpose, when, in law, it was not, and all this appears upon the record, the supreme court will notice the error, although no specific exception was taken to it on the trial by the defendant. *Grist v. Backhouse*, 4 Dev. and Bat., 362.

29. Where a party objects upon a trial that a grant is void on its face, but the judge decides otherwise, if the copy referred to

in, and sent up with, the case, exhibit no defect, the supreme court cannot grant a new trial; for if the copy sent up be a correct transcript of the grant, it is apparent that there was no ground for the objection; and if the grant be not that whereof a copy is given, as the supposed vices or defects in it are no way indicated, the court is wholly without the means of reviewing the opinion complained of, and of course will presume it to be correct. *Bronson v. Paynter*, 4 Dev. and Bat., 393.

30. The attention of the supreme court is more properly given to such errors as are alleged by the party who appeals. But when the case states all the facts in relation to a question decided against the appellee, which, if decided for him would render errors, of which the appellant complains, immaterial, then the court will consider such question; because if that were improperly decided, the verdict and judgment ought not to be disturbed, as upon the whole case they are right. *Norwood v. Morrow*, 4 Dev. and Bat., 442.

31. If a case agreed do not state a *fact*, but sets forth only evidence tending to show that fact, it is not competent for the court to infer the fact from any evidence which does not, *in law*, establish it, or to direct the jury so to infer it. Hence, where a case agreed sets forth that a vendee took possession of the land, soon after the execution of a bond to make him title upon his paying the purchase money, and held uninterruptedly for twenty years—that the vendor lived nearly three years after the purchase money became due—that, after his death, the administrator set up no demand for the purchase money, but on the contrary executed a conveyance for the land—that one of the heirs acquiesced in the possession held under that conveyance for four years after he came of age—the court cannot say, that the purchase money was paid, and the conveyance therefore valid; but such circumstances are proper to be left to the jury, to infer the fact of such payment if they should so think, and therefore to find a verdict for the defendant. *Williams v. Peal*, 4 Dev. and Bat., 471.

32. The supreme court will presume the judgment in the court below to have been right, unless error be shown; and it is the duty of the appellant to furnish the court with the means of ascertaining such error. *Wall v. Hinson*, 1 Ired., 276.

33. It is the duty of the appellant to the supreme court to see the case so made out, as distinctly to present the points upon which the judgment below is sought to be reviewed. *Flannikin v. Lee*, 1 Ired., 293.

34. When an appeal is brought up to the supreme court, it is the duty of the appellant to have the transcript of the record so perfected, that the court may be enabled to discover the error, if there were any, in the judgment of the superior court; and on his failure to do so, after a reasonable opportunity has

been afforded, the judgment will be affirmed. *Stewart v. Garland*, 1 Ired., 470.

35. Where the judgment below is one of non-suit, and no declaration was filed, and the plaintiff, after a reasonable time allowed, failed to supply that defect, *that* is also a ground for affirming the judgment. *Ibid.*

36. The supreme court, as a court of error, has no right to affirm in part and reverse in part an indivisible judgment. *Davis v. Campbell*, 1 Ired., 482.

37. Where deeds, records, &c., are referred to and make a necessary part of the case transmitted to the supreme court, it is the duty of the appellant to see that they accompany the case: otherwise the court cannot determine that there is any error in the opinion of the court below, and the judgment will, of course, be affirmed. *Waugh v. Andrews*, 2 Ired., 75.

38. A party can except in the supreme court for error to an instruction which he had himself prayed. *Buie v. Buie*, 2 Ired., 87.

39. Where two persons have been tried on an indictment, and the transcript of the record sent to the supreme court sets forth only the verdict of the case of the one who appealed, and does not state the verdict in the case of the other, it is not an error of which the appellant can take advantage. *State v. Martin*, 2 Ired., 101.

40. It is not competent for a party to object in the supreme court to the admission in the court below of evidence offered by himself. *Justice v. Justice*, 3 Ired., 58.

41. Upon the suggestion in the supreme court of the death of a party, which is denied, the court will decide the question on affidavits. *Lee v. Gause*, 3 Ired., 585.

42. Where pleadings are not filed, no final judgment will be entered in the supreme court. *Runyon v. Anderson*, 3 Ired., 586.

43. If the death of a plaintiff occur after the commencement of the term of the supreme court, at which the appeal in his case is regularly entered, although the judgment be not rendered at that term, the court may enter a judgment *nunc pro tunc*, as of a day previous to his death; but they cannot do so, when he died previous to the commencement of the term. *Lea v. Gause*, 4 Ired., 9.

44. In the supreme court every judgment of the superior court is presumed to be right, unless it appears to be erroneous; and it is the duty of the appellant to have the matter stated on the record, upon which he insists there is error, else the judgment will be affirmed as a matter of course. *Fleming v. Halcomb*, 4 Ired., 268.

45. Where a motion is made in the court below, even in a capital case, to set aside a verdict, upon the ground of improper conduct in the jurors, or other matter extrinsic of the record,

and this motion is founded on affidavits, the supreme court will not look into the affidavits. It can only decide upon the record presented to it, and, therefore, if such motion is designed to be submitted to its revision, the *facts* must be ascertained by the court below, and spread upon the record. *State v. Godwin*, 5 Ired., 401.

46. The court below should not present to the supreme court, for its determination, points, which did not arise from facts proved on the trial, but from alleged facts made the foundation of a motion for a new trial. *Caldwell v. Black*, 5 Ired., 463.

47. The record sent up to the supreme court should not state the points of law arising on the trial, which was decided by the judge below against the party in whose favor is given the final judgment, from which the other party appeals. *Gathings v. Williams*, 5 Ired., 487.

48. The superior court, when an appeal is taken to the supreme court, should only state so much of the evidence as raised a question of law at the trial, and then the opinion prayed and given thereon with simplicity and precision. A report of the whole trial below is out of place in the case to be sent to the supreme court. *Green v. Collins*, 6 Ired., 139.

49. The supreme court cannot look into affidavits filed in the court below upon the question, whether dower was properly ad-measured or not, as they form no part of the record. *Bowman v. Thompson*, 6 Ired., 224.

50. The supreme court will not take any notice of mistakes by the jury in the court below, whether or not they find against the facts or the law. The jurisdiction of the court is confined to matters of law, decided by the judge below, and to ascertain what matters of law were so adjudged they look to the case stated, which is in the nature of a bill of exceptions. *State v. Galimore*, 7 Ired., 147.

51. But upon a motion in arrest of judgment, the supreme court will look into the whole record, and, if they find error, will so decide. *Ibid.*

52. In an action of debt upon a bond, where the defendant has pleaded several pleas, and among others that of *non est factum*, and the jury find all the issues in favor of the defendant, the supreme court is concluded by that verdict from enquiring into the instructions given in the court below in relation to the pleas other than the general issue. *Doub v. Hauser*, 7 Ired., 167.

53. A defendant must, in his exception, show some error to his prejudice; otherwise the supreme court will not set aside the verdict of the jury. *State v. Cowan*, 7 Ired., 239.

54. The supreme court cannot act upon affidavits offered in the court below. It is the province of that court exclusively to determine the facts, and the supreme court can only review so

much of the judgment as relates to matters of law. *Rinehardt v. Potts*, 7 Ired., 403.

55. Where, on a *sci. fa.* against bail, the pleas were no *ca. sa.* issued and payment, and the jury found all the issue in favor of the defendant, the supreme court will not enquire into the correctness of the charge of the judge as to one of the pleas only, that of the validity of the *ca. sa.* *Hall v. Woodside*, 8 Ired., 119.

56. In cases brought to the supreme court, when the error assigned is in admitting or rejecting evidence, the exception must set out the evidence itself, which was improperly admitted, or offered and improperly rejected. *Sutliff v. Lunsford*, 8 Ired., 318.

57. It is incumbent upon a party excepting, when the error alleged consists in rejecting evidence, to show distinctly what the evidence was, in order that its relevancy may appear, and that it may be seen that a prejudice has arisen to him from the rejection. In like manner, when the alleged error consists in admitting evidence, the exception must set forth the evidence actually given, as it is the only means whereby the court can ascertain, whether the admission did, or might have done, the party a harm. *Whitesides v. Twitty*, 8 Ired., 431.

58. It is the rule of the supreme court, as in every other court of errors, that he who alleges an error must show it; and that the judgment appealed from must stand as correct, unless it is shown to be incorrect. *Walton v. Smith*, 8 Ired., 520.

59. Where there are more pleas than one, as payment and *vi debet*, and the jury find for the defendant on both, the judgment must be affirmed without regard to an alleged error as to the plea of payment. *Munroe v. Stutts*, 9 Ired., 49.

60. Where a party moved to be permitted to show a paper to a witness for the purpose of refreshing his memory, which motion was refused, and an appeal taken to the supreme court, it must appear in the case sent up what were the contents of the paper, that the court may see whether they were such as were calculated to have the effect proposed. *Lee v. Patrick*, 9 Ired., 135.

61. The statement of the case by the presiding judge is, in our practice, a substitute for a bill of exceptions, which sets forth the error complained of. If no such statement accompanies the appeal, and no error appears on the record, the judgment will be affirmed. *State v. Ray*, 10 Ired., 29.

62. Where there is an appeal by either party from an interlocutory order in relation to a rule founded on an affidavit, the court below should certify the facts as it finds them, and not merely the affidavit, which is only evidence. *Wallace v. Reid*, 10 Ired., 61.

63. Where a verdict is rendered in the court below in favor of

the plaintiff, he cannot, in the supreme court, suffer a non-suit. *State v. Mizell*, 10 Ired., 279.

64. On the trial of an indictment for murder, where it is alleged for error that the court improperly overruled a challenge of the prisoner to one of the jurors, the record must show for what cause the challenge was made; otherwise the supreme court cannot say whether there was error or not. *State v. Dove*, 10 Ired., 469.

65. Where several cases have, after argument, been decided upon the same question, the court will not reconsider the grounds of those decisions, especially upon a case presented without argument. *Fagan v. Armistead*, 11 Ired., 433.

66. A party, who does not except to an opinion in the court below on a point of law, is precluded from making an exception in the supreme court, when the cause comes on to be argued there. *Gant v. Hunsucker*, 12 Ired., 254.

67. Where, in an action of warranty, the only question raised was as to the proper rule respecting damages, and the jury find all the issues in favor of the defendant, the charge of the judge becomes immaterial, and, even if erroneous, cannot be reviewed. *Ramsay v. Morris*, 13 Ired., 458.

68. Where no bill of exceptions, nor statement in the nature thereof, accompanies the record of a case sent to the supreme court, the judgment below is affirmed as of course; there being no error in the record. *State v. Orrell*, Busb., 217.

69. The supreme court will not take notice of the statement of facts, made by the judge below, when no issue is joined in regard thereto. *Strambury v. Heckman*, Busb., 250.

70. The supreme court, in cases at law, is strictly a court of errors, and, therefore, on an appeal, can notice only matters of law appearing on the record proper, or in the bill of exceptions, or statement in the nature thereof. *State v. Langford*, Busb., 436.

71. Where an exception shows, or supposes, a state of things inconsistent with the statement made up by the judge, it must be disregarded, and the statement taken to be true. *Ibid.*

72. It is improper for the judge in the court below, to send up depositions containing exceptionable evidence, with a statement that "only such parts of said depositions were read as were admissible evidence" without designating what part he deemed admissible, and what otherwise. *Wells v. Clements*, 3 Jones, 168.

73. In the statement of the case for the supreme court, it is not necessary to set out what a witness is expected to prove who is himself objected to as incompetent; it being essential to do that only when the particular evidence which he is expected to give is the ground of objection. *State v. Jim*, 3 Jones, 348, S. P. *Otey v. Hoyt*, 3 Jones, 407.

74. Where a case has been sent to the supreme court irregularly and improperly, and decided by the court under the impres-

sion that it was before it by the consent of parties, the court will, on its appearing at the same term that it was not before it by consent, order the judgment to be vacated and the cause stricken from the docket. *Mann v. Taylor*, 4 Jones, 127.

75. The bill of exceptions need not set out what a witness was called to prove, when he is excepted to on the ground of being incompetent to testify at all. *Wright v. Stowe*, 4 Jones, 516.

76. The supreme court will not decide upon the propriety of an order, discharging a rule for the production of papers under the 82nd section of the 31st chapter of the Revised Code, unless the facts are stated upon which the order was made; and the affidavit upon which the application for the order was made to the court below, sent up without a statement that it was acted upon as true, is only *evidence of a fact*, and not the *statement of a fact* by the court below. *Maxwell v. McDowell*, 5 Jones, 391.

77. The appellant cannot, in the supreme court, raise an objection on his bill of exceptions in regard to a matter not excepted to in the court below; because the facts are not supposed to be stated in the bill of exceptions with reference to any other points than those taken on the trial. *State v. Jenkins*, 6 Jones, 19, S. P. *Grace v. Hannah*, 6 Jones, 94.

78. The supreme court must affirm the judgment, when the bill of exceptions does not show whether the court below erred or not. *Brown v. Gray*, 6 Jones, 103.

79. Where a judgment of nonsuit was rendered in the superior court, upon the ground that the facts did not justify a recovery, and it appeared to the supreme court from the bill of exceptions that the court below erred, but it also appeared to the supreme court from the record proper that there was error as to the party plaintiff of record which, however, had not been noticed in the court below, *it was held* that the supreme court was not bound, under such circumstances, to notice the error in the record, but should reverse the judgment for the error apparent in the bill of exceptions and order a *venire de novo* in the court below, where the plaintiff might apply for an amendment. *Caroon v. Rogers*, 6 Jones, 240.

80. The supreme court cannot proceed to judgment on appeals from final judgments, without an inspection of the whole record. Where, therefore, in a proceeding to recover damages for ponding water back on plaintiff's land, the counsel agreed that only so much of the record should be sent up as was "necessary to present the points in issue," which was accordingly done, the supreme court refused to give any judgment. *Wright v. Stowe*, 7 Jones, 622.

81. The supreme court cannot notice objections not appearing on the record, or the case sent up by the judge in the nature of a bill of exceptions. *Gregory v. Richards*, 8 Jones, 410.

See (Executors and Administrators—Of their liability to legatees and next of kin, 18.)

XVII. EQUITY PRACTICE IN SUITS OF AN EQUITABLE NATURE BROUGHT IN COURTS OF LAW.

1. A petition was filed in the county court for an account of an intestate's estate, to which an answer was put in and replication taken. After an appeal to the superior court from an interlocutory order to account, the defendant, by leave of the court, filed an amended answer, stating an additional fact upon which he relied. No new replication was entered to this, but the parties went on to take depositions and make up an issue as to this additional fact. *It was held* by the court that, from the conduct of the parties, it must be inferred that the additional fact stated was intended as an amendment to the original answer, *nunc pro tunc*, and was covered by the replication to that answer. *Guyther v. Picot*, 1 Ired., 446.

2. An order taking a bill *pro confesso*, for want of an answer, dispenses with proof on the hearing, and is conclusive that the matter of the bill is true, as if the same were confessed in an answer. *Attorney General v. Carver*, 12 Ired., 231.

3. If a bill, though confessed, does not entitle the plaintiff to a decree, it must be dismissed; but if it contain matter for some decree for the plaintiff, that decree will be made. Its nature, however, will depend upon the consideration, whether there be, or be not, enough in the bill to show the precise extent of the relief, which the plaintiff ought to have. If, for example, the bill be for the specific performance of a contract for the sale of land, and it is not so described in the bill or contract as to identify it by such metes and bounds as ought to be inserted in the conveyance to be decreed, then, on the hearing the court would only declare, that it was fit the contract should be specifically performed; and a survey and enquiry would be directed thereon, and, of course, the party might offer proof touching that matter. *Ibid.*

4. An action is ordered by a court of equity to be brought in a court of law, where the equity is based upon a disputed legal right, or where the defence set up involves a legal right. Certain conditions are usually imposed by the court of equity upon the parties; but besides these, the whole course of the trial is according to the rules governing the court of law. That court may grant a *certiorari* or a new trial; may order a removal or allow an appeal, &c. When the judgment is finally rendered in the court of law, it proceeds no further, but certifies the matter to the court of equity for its action upon the same. *Fisher v. Carroll*, 1 Jones, 27.

5. An *issue* is sent to be tried before a court of law, for the

purpose of aiding the court of equity in the ascertainment of facts. The court of law can take no action upon the finding of the jury, but simply returns the verdict with his notes of the trial or statement of the case to the supreme court, if that be the court of equity. When taken up for further directions, that court will pass upon the regularity of the proceeding of the court of law from the judge's statement, and order another trial, or not, as it may deem expedient. *Ibid.*

6. Where a petition was filed for a partition of slaves and money, and there was no answer, no judgment *pro confesso*, no issue made up, and no order made for setting the cause for hearing, it was held to be erroneous for the court to make any decree. *Billups v. Riddick*, 8 Jones, 163.

7. A person, who is not a party to a petition to sell land for the payment of debts under the Rev. Code, ch. 46, sec. 45, and following, cannot appeal, or file a petition to re-hear or a bill to review any order or decree made by the county court. *Thompson v. Cox*, 8 Jones, 311.

See (Executors and Administrators—Of their liability to legatees and next of kin, 14-15-16-17-18-22-23.) (Executors and Administrators—Their liability to creditors, &c., 67.) (Practice—Of the trial and its incidents, 9.)

PRESUMPTIONS.

See (Deed—Of the presumption of a deed.) (Evidence—Presumptions.) (Grant—Of the presumption of a grant.) (Guardian and Ward—Of the liability of guardians and their sureties, 9.) (Heirs, 48.) (Highway, 15-22-23-24-25-34-35-40-42-43-45.) (Husband and Wife—Husband's interest in his wife's estate, &c., 20.) (Judgment—Of the satisfaction of judgments, 5-7-8.) (Legacy—Of the assent of the executor and its effect, 4-6-8-10-11-12-19-20.) (Legacy—When it will be presumed to have been paid or satisfied.) (Payment, 14-15.) (Slaves—Of their emancipation, 12-16-19-20-21.) (Tenants in common, 9-10-27.) (Trespass—Of trespass *quare clausum fregit*, 46.) (Trove—When it will lie, 14.) (Way.) (Widow—Of her dower, 38.)

PRINCIPAL.

See (Accessory.) (Agent and Principal.) (Surety and Principal.)

PRISON BOUNDS.

1. A bond to keep the prison bounds need not be proved by the subscribing witness, for it must, under the act authorizing it, be deemed a record, so far as concerns proof of its execution.

Wynn v. Brickell, Tay., 140, (87) S. C., 2 Hay., 69, (236.)

2. An action cannot be maintained upon a bond, given by a person arrested on a *ca. sa.* to keep the prison bounds, for, by act of assembly, such bond has the force of a judgment, and the creditor may have execution thereon upon motion in court. *Brown v. Frazier*, 1 Murph., 421. See Rev. Code, ch. 87, sec. 14.)

3. A prisoner, who has been convicted of a misdemeanor and sentenced to imprisonment in the jail, can only be entitled to the privilege of the prison bounds or rules, under the act of assembly, by an express order or rule of the court which sentences him. *State v. Bradley*, 4 Ired., 543. (See Rev. Code, ch. 87, sec. 11.)

4. A sheriff has no authority to take a bond for keeping the prison bounds, from a person arrested on a *ca. sa.*, until after he has been committed to close custody, and a bond so taken is void. *Northam v. Terry*, 8 Ired., 175.

5. Where a summary judgment is moved for on such bond, it is not necessary for the defendants to plead *non est factum*, but they may give the whole matter in evidence to the court. *Ibid.*

6. In a summary proceeding by motion for a judgment on a bond to keep the prison bounds, if the defendant plead matters of fact *in pais*, he is entitled to have them tried by a jury. *Whitley v. Gaylord*, 3 Jones, 286.

See (Insolvent Debtors—Proceedings under the insolvent debtors' acts prior to act of 1822, 5-6-10.) (Insolvent Debtors—Of the creditor's liability for the maintenance of his debtor in jail, 3.) (Sheriff—Duty of sheriffs in relation to process, its execution and return, 11.)

PRIVIES.

1. Privies in estate are those who come in under the owner, and the estate stands burthened in their hands with the incumbrances created by him, before he parted with it. But one, who comes in under a sheriff's sale upon execution, cannot be called a privy, for he is not only clothed with the title of the defendant in the execution, but with the rights of the creditor, which may be paramount to the debtor *quoad* the thing sold. *Briley v. Cherry*, 2 Dev., 2.

PROCESS.

1. A writ must be attested, as well as signed, by the clerk of the court from which it issues. *Buchanan v. Kennon*, Conf. Rep., 476, (530.)

2. The defects in a writ are cured by statute after verdict. Therefore, the judgment will not be arrested, because the writ is tested by the clerk and signed by the deputy clerk. *Dudley v. Carmolt*, 1 Murph., 339. S. C. 2 Hay., 407, (616.)

3. A writ, issuing to one county from the court of another, must have the seal of the court from which it issues impressed upon it. *Governor v. McRae*, 3 Hawks, 226.

4. A *subpoena* is good, which is tested in a certain year of American Independence, though the year of our Lord is not named. *Goodman v. Armistead*, 4 Hawks, 19.

5. The endorsement of an attorney on a writ is only *prima facie* evidence of the time when it issued, and the true time may be shown. *Boyden v. Odeneal*, 1 Dev., 171.

6. Erroneous process is a justification to the officer who executes it, but not to the person who sues it out. *Weaver v. Cryer*, 1 Dev., 337.

7. A writ signed with the name of the clerk by an attorney, under a verbal deputation of the clerk to all the members of the bar, is a nullity, as deputy clerks can only be appointed in the mode prescribed by the act of assembly, and the sheriff is not liable for an omission to act under such a writ, nor for making a false return on it, although he has treated the writ as valid, and upon his return of it, it was recognized to be so by the clerk whose name was signed to it. *Shepherd v. Lane*, 2 Dev., 148. S. P. *Gardner v. Lane*, 3 Dev., 53.

8. The original writ, though not signed by the clerk, cannot be objected to after verdict, as the objection ought to have been by a plea in abatement. *Worthington v. Arnold*, 2 Dev., 363.

9. An omission to date a writ is not to be availed of as an objection except by a plea in abatement. *Dowell v. Vannoy*, 3 Dev., 43.

10. Sealing is necessary to the validity of all writs, except those issuing to the county to the court of which they are returnable; and a sheriff, by acting under an unsealed writ, does not thereby render it valid. But, it seems, that where he has acted under such a writ, the court from which it issued may, after its return, render it valid by affixing the seal. *Seawell v. Cape Fear Bank*, 3 Dev., 279. S. P. *Finley v. Smith*, 4 Dev., 95.

11. The forms of a writ, the execution of which has so important an operation as to deprive a citizen of his liberty, are so many securities for the liberty of all the citizens; and no writ

ought to be considered a *ca. sa.* which plainly disregards them. *Finley v. Smith*, 4 Dev., 95.

12. An attachment before a justice, not made returnable on its face within thirty days from the issuing thereof, is *void*, by the express provisions of the attachment law. So, attachments from a justice, like other original process not made returnable on a certain day, are void. *Clark v. Quinn*, 5 Ired., 175.

PROCESSIONING.

1. The report of a proccessioner to the county court, upon which the court is to order five freeholders to go with him to proccession the land, will not be good unless it sets forth the line or lines in dispute, and the circumstances on which the dispute is founded, so as to enable the court to decide which party has prevailed, whether the lines have been established correctly, and who shall pay the costs. *Wilson v. Safford*, 3 Murph., 504. (See Rev. Code, ch. 88, sec. 6.)

2. The return of a proccessioner must set out the courses and distances in words at full length. Hence, where the courses were expressed by abbreviations, and the distances in figures, the return was set aside. *Cansler v. Hoke*, 3 Dev., 268.

3. Under the proccessioning act, when one of the parties objects to the proccessioner's proceedings, the proccessioner must, in his return to the court, state "all the circumstances of the case," as for instance, the nature of the objection, the line or lines claimed by each party, &c. If he do not, the report is invalid, and should be quashed. *Carpenter v. Whitworth*, 3 Ired., 204.

4. In a proceeding under the proccessioning act, where the proccession has been stopped in running the lines by a party claiming the land, it is not necessary to show that such party had previous notice that the lines were about to be run. *Miller v. Heart*, 4 Ired., 23.

5. The report of a proccessioner, that he has been stoped by a party in running a disputed line, constitutes between the parties claiming and disputing that line a cause of record, and each, without further notice, must be presumed to know what is judicially done therein. *Ibid.*

6. An objection to any of the commissioners appointed by the court is in the nature of a challenge, and should be brought forward when the appointment is about to be made. *Ibid.*

7. The adjudication of the commissioners affects only the rights of the parties contesting. *Ibid.*

8. The report of a processioner ought to state the lines claimed by each party, and that while running a line claimed by one party, he was stopped by the other; and he must set forth particularly the locality of the line thus claimed, and of the part of it at which he was stopped, so as to constitute an issue as to the boundary. *Matthews v. Matthews*, 4 Ired., 155.

9. A report of a processioner is radically defective, which does not state with precision the claims of the respective parties, so as to show what lines were disputed, or how far they were disputed. *Hoyle v. Wilson*, 7 Ired., 466.

10. The important and conclusive effect given by the statute in relation to processioning, whereby two inquisitions of the processioner vest an absolute title, requires the court to view the proceedings with a vigilant eye, that no injury may accrue from tolerating an undue laxity in the proceedings. *Ibid.*

PROFANE SWEARING.

See (Indictment—When an indictment will lie, 10.) (Indictment—Form and matters relating thereto, 140.)

PROHIBITION.

It seems that no court has the power to issue a writ of prohibition, pending a dispute between competitors for a public office, to prohibit those who are *de facto* in possession of the office, from exercising the functions thereof. But if any court has the power, it should never exercise it, except in a very clear case, peremptorily calling for an immediate remedy. *State v. Allen*, 2 Ired., 183.

2. If a writ of prohibition can be issued, it should only be after notice to the parties to be affected, and affidavits verifying the suggestions upon which the writ is granted. *Ibid.*

PURCHASER.

See (Vendor and Purchaser.)

QUO WARRANTO.

See (*Mandamus* and *Quo Warranto*.)

RAILROAD COMPANY.

See (Action on the case—When case will, or will not, lie, 7-, 8-9-10-15-16-17-32-36-40-42-43-44.) (Constitution—Acts which have been declared constitutional, 13.) (Constitution—Construction of various clauses of the constitution, 11-12.) (Corporation—Of corporations generally, 11-12-15-18-19.) (Corporations—Of particular corporations, 8-9-10-14-15.) (Highway, 10-11.) (Indictment—Form and matters relating thereto, 151.) (Justices of the Peace—Of justices' warrants in civil cases, 16.) (Carriers—Of the duties and liabilities of carriers, 8-9-12-13-14-15-16-17-18.)

RAPE.

1. In an indictment under the Rev. Code, ch. 34, sec. 5, for carnally knowing and abusing an infant female under the age of ten years, there must be proof of emission of seed as well as of penetration, in order to convict the offender. *State v. Gray*, 8 Jones, 170. (Proof of penetration only is now sufficient to convict of this offence, or of rape. See act of 1860, ch. 30.)

2. A colored infant under the age of fourteen years cannot commit a rape, nor be guilty of an assault with intent to commit a rape, under the Rev. Code, ch. 109, sec. 44. *State v. Sam*, 1 Winst., 300.

See (Indictment—Form and matters relating thereto, 24-55-70-99-121-122-155-156.) (Indictment—Plea of former acquittal or conviction, 9-10-11-12-13.) (Infants and Infancy, 24.) (Evidence—In criminal proceeding and indictments, 62-63-89-119.)

RECEIPT.

See (Accord and Satisfaction, 4.) (Evidence—Books of original entries, accounts, receipts, &c., 1-8-9-14.) (Indictment—In what cases an indictment will lie, 17.)

RECEIVING STOLEN GOODS.

See (Indictment—Form and matters relating thereto, 146.) (Accessory, 3.)

RECOGNIZANCE.

1. Lands are bound by recognizances from the time they are entered into, but by *fi. fas.* only from their *teste*. *State v. Magness*, 1 Hay., 99, (115.)

2. A recognizance creates an express, original and specific lien, which attaches to the lands then owned by the *conusor*, and if the lands be afterwards conveyed they pass *cum onere*. *Burton v. Murphy*, 2 Murph., 339. S. C., N. C. Term, R., 259, (684.)

3. A party bound over to court and attending is discharged from his recognizance at the end of the term, unless he be rebound. *Murray v. Lackey*, 2 Murph., 368.

4. Where one forfeited his recognizance, and the *sci. fa.* issued against him to show cause why execution should not issue for the sum, "for a *fine* on a forfeited recognizance in failing to appear," &c., *it was held* on the plea of *nul tiel record*, that the word "fine" might be rejected as surplusage, and that the State was entitled to judgment. *State v. Dickenson*, 3 Murph., 10.

5. Where a recognizance was remitted in the county court, and the State appealed, *held* that the superior court must hear the cause *de novo*, and the defendant must show cause in the same manner as in the county court. *State v. Jackson*, 3 Murph., 230.

6. In a proceeding upon a record of the county court, the superior court cannot enquire whether the record ought to have been made up, but simply whether it was made up. Hence where the record of a *sci. fa.* on a recognizance taken in the county court and the record of the recognizance itself differed, and, after an appeal to the superior court, the county court amended

the entry of the recognizance, *it was held* to be proper. *State v. Cherry*, 2 Dev., 550.

7. Where a prisoner was committed to the custody of the sheriff until he entered into a recognizance, *it was held* to be doubtful whether a sheriff was authorized to take a recognizance, but in this case the recognizance not being taken by the sheriff as a judicial officer, but simply signed by the parties and attested by him, without the addition of his office, *it was held* not to be a recognizance, but a simple obligation. *State v. Mills*, 2 Dev., 555.

8. A recognizance is a specific lien, which is not lost by suing out a *fi. fa.* *Hoke v. Henderson*, 3 Dev., 12.

9. A *sci. fa.* reciting that the defendant "was lately bound in a recognizance in, &c., for the appearance of T. L. as, &c., that the said T. S. failed to make his appearance as he was bound to do, and that it was thereupon ordered by the court that he forfeit his recognizance according to law," and commanding the sheriff to make known, &c., is irregular, uncertain and defective. And although objections to it cannot be taken upon the plea of *nul tiel record*, a *cassetur* is the only proper judgment. *State v. Mills*, 2 Dev. and Bat., 552.

10. A recognizance is a debt of record, and is of the nature of of a conditional judgment, which the recorded default makes absolute, subject only to such matters of legal avoidance, as may be shown by plea, or to such matters of relief, as may induce the court to remit or mitigate the forfeiture; and the object of a *sci. fa.* is to notify the cognizor to show cause why execution should not issue for the sum acknowledged. The act of 1777 makes it imperative that the *sci. fa.* shall issue, and judgment be had thereon, previous to suing out an execution upon a forfeited recognizance. But no judgment of forfeiture is thereby required before the issuing of the *sci. fa.* *Ibid.* (See Rev. Code, ch. 35, sec. 43.)

11. The obligation of a recognizance, entered into by a party before a single justice, to appear and answer a criminal charge, does not depend upon the enquiry whether the court, before which he is required to appear, has jurisdiction of the particular crime charged, but upon the duty and power of the justice to examine and admit the party to bail. Hence, under the act of 1715, prescribing the duties and powers of justices out of court, in examining criminals and taking bail, a recognizance taken for the appearance of the party at the county court is good, and, if the party fail to appear according to the condition of the obligation, may be enforced, although the offence charged is cognizable only in the superior court. *State v. Edney*, 4 Dev. and Bat., 378. (See Rev. Code, ch. 35, sec. 1.)

12. The words of the act of 1715, prescribing that the justice shall take recognizances from the informer and witnesses to ap-

pear at the next court "where the matter is cognizable," and that the recognizances shall be returned into the office of "the court, wherein the matter is to be tried," are merely directory as to the time and place of returning the proceedings, so that they may be acted on speedily and efficiently, for the advantage of each side. They mean only, that the return shall be made to the next term of the court, in which, according to the recognizance, the party is to appear, so that the party shall not be required to appear at one term, or in one court, and the recognizance be returned to a subsequent term, or to a different court. *Ibid.*

13. The solicitor for the State is not entitled to a fee on a recognizance to keep the peace. *State v. Red*, 2 Ired., 265.

14. When a recognizance to keep the peace is taken and not returned to the term of the court to which it is returnable, and the recognizance is not broken before the return term, *no* costs can, at a subsequent term, be awarded against the defendant. *Ibid.*

15. If a justice fail to return, at the proper term, a recognizance to keep the peace, and the recognizance be broken, the solicitor for the State may, at a subsequent term, cause the recognizance to be returned, suggest a breach, enter a judgment *nisi*, and issue a *sci. fa.* *Ibid.*

16. A sheriff has no right to take a recognizance to keep the peace from any person arrested by him for a breach of the peace, or committed to his custody by a court for want of sureties for keeping the peace. But when he makes an arrest for a breach of the peace, or to prevent a breach of the peace, as he may do, he can only carry the offender before a judge or justice of the peace, who may commit or bail him, as if he had been arrested on a warrant. *State v. Hill*, 3 Ired., 398.

17. Regularly, if a person be committed by a court for want of sureties to keep the peace, and he afterwards become able to give them, he should be taken by *habeas corpus* before a judge, for the purpose of entering into a recognizance. But in our practice, the court generally, by consent of the prosecuting officer, entrusts the power of taking the recognizance to a justice of the peace. *Ibid.*

18. A recognizance, conditioned for the appearance of a party at one day, is not forfeited by his failure to appear at another day, to which the holding the court was changed by an act of assembly passed after the taking of the recognizance, the act containing no provision that recognizances should be returned and parties appear on that day. *State v. Melton*, Busb., 426.

19. A judge, being possessed of jurisdiction over the person of a prisoner by any proceeding before him, may adjudge that he be allowed bail, and make an order that his recognizance be taken by a justice or justices of the peace, named by him, in a sum

fixed by him; and a recognizance taken according to such order is valid. *State v. Edney*, 2 Winst., 71.

20. An instrument of writing, executed with an intention to comply with such an order, in form a bond signed and sealed by the prisoner and his surety, on the prisoner's being let out of jail, and received by the justices named, by them returned to the proper court, and by its order filed as a record, is a recognizance. *Ibid.*

21. The taking a recognizance consists in making and attesting a memorandum of the acknowledgement of a debt due to the State, and of the condition on which it is to be defeated. *Ibid.*

22. The presenting a petition to a judge for a writ of *habeas corpus*, for the purpose of being released from prison on giving bail, gives him jurisdiction over the subject, and the parties may waive all errors and dispense with all forms, in the proceedings on it in relation to the entering into a recognizance. *Ibid.*

23. Where a petition for a writ of *habeas corpus* was presented to a judge in order that the petitioner might be admitted to bail, and the judge gave no formal judgment, but merely expressed his opinion in writing on the petition that the prisoner was entitled to bail, and signed his name *officially* to a sheet of paper that a writ might issue if the parties desired it, and by the consent of the solicitor for the State suggested that bail might be taken without any further proceedings on the petition, and fixed the amount in which bail should be taken, and named the justices of the peace to take it, and the prisoner was afterwards discharged from jail on his entering into a recognizance together with the defendant as his surety, in the sum fixed by the judge before the justices named by him, and the prisoner and defendant subscribed their names, and affixed their seals to the recognizance—this is plenary proof of a waiver of all errors in the proceedings. *Ibid.*

24. *It seems* that the defendant would be *estopped* by the recital, that "upon application to the judge he had ordered that the prisoners be allowed bail in the sum of \$2000 each, and had authorized the two justices to take the recognizance." *Ibid.*

RECORD.

1. A record is deemed in law authentic beyond all contradiction, and when regularly certified by the proper officer, it is conclusive upon the plea of *nul tiel record*. But where a clerk made an entry, by order of the judge of the court, in the record

of a cause, the day after the term, and at the next succeeding term, a motion was made to strike the same out; *held* that such entry is in fact no part of the record, and that the court should order it to be annulled and expunged; and *held* also that the affidavits of the party and the clerk in favor of such motion should be heard. *Austin v. Rodman*, 1 Hawks, 71.

2. Where a suit was referred to arbitrators, who returned their award in vacation, when the clerk entered it on the record as a judgment entered in court, such an entry was ordered to be expunged, and the whole proceeding held void in law, although the party to be effected by it had subsequently given a release of all errors. *Tisdale v. Gandy*, 1 Hawks, 282.

3. Where, upon the plea of *nul tiel record*, it appeared that no formal judgment was entered on the record, the court held that it must overlook the objection, as otherwise, owing to the looseness of the practice, the proceedings of courts for years back would be overturned. *Deloach v. Worke*, 3 Hawks, 36.

4. It is a sufficient record of the holding a court by a competent person, when the transcript states that it was held by the Hon. J. P., without adding that he is one of the judges, &c., if, in fact, he be one of the judges, &c. *State v. Lewis*, 3 Hawks, 410.

5. The records of a court, upon a matter within its jurisdiction, when offered in evidence in the same or any other court, cannot be impeached collaterally. But a court, upon proper proceedings instituted for the purpose, may examine into and ascertain how that which appears regularly upon their records came there, and may expunge it, if it were put there improperly. This power is confided to the court of which the matter appears to be a record, and no other court possesses it, unless acting in an appellate capacity. *Reid v. Kelly*, 1 Dev. 313.

6. The records of a court cannot be explained by parol testimony. *Wade v. Odeneal*, 3 Dev., 423.

7. When a record from another state in the Union is declared on, or pleaded in bar in this state, the only proper plea or replication is *nul tiel record*; and that, both as to its existence and effect, is to be passed on by the court on inspection, and not by the jury. *Carter v. Wilson*, 1 Dev. and Bat., 362.

8. An entry upon the record of a cause pending in Virginia, whereby, by consent of parties, the suit is dismissed, and the defendant adjudged to pay the plaintiff his costs, not being in that state a bar to a subsequent suit for the same cause of action, is not so here; neither is the entry of the payment of costs, in the absence of all other proof, evidence to support the plea of accord and satisfaction. *Carter v. Wilson*, 2 Dev. and Bat., 276.

9. In a court of supreme original jurisdiction, the law always presumes until the contrary appears, that the proceedings which the record of the court shows to have been had, were, as con-

cerns form and manner, correctly done. *State v. Christmas*, 4 Dev. and Bat., 410.

10. Upon the destruction of any part of the record, while a suit is pending, or rather of the process, pleadings or orders in a suit, such loss may be supplied by making up others in their stead, provided the court can be reasonably satisfied that the two are of the same tenor. And upon that matter the court, in which the suit is, must exercise its judgment. *Harris v. McRae*, 4 Ired., 81.

11. When the records of the court are made up, no power but that of the court itself can touch them; to alter them. They are in the hands of the clerk a sacred deposit, over which he has no more power than any other person, except to preserve them. *Otey v. Rogers*, 4 Ired., 534.

12. The records of a court, upon matters within its jurisdiction, cannot, when offered in evidence, be impugned by counter evidence. *Galloway v. Keithen*, 5 Ired., 12.

13. Where the plea of *nul tiel record* is pleaded to a judgment or other proceeding in a court of record in another state, the court to which it is exhibited must, from necessity, decide not only upon the existence of the supposed record, but upon its effect. *Moore v. Gwynn*, 5 Ired., 187.

14. A certificate from a clerk of the county court simply stating that "A. B. came into court and qualified as constable, &c., having been duly elected by the people," &c., without setting forth whether there were three or more justices on the bench on that or any preceding day, cannot be received as a transcript of the record of the court, because it does not appear that there were justices enough to constitute a court, and, therefore, having authority to make, or cause to be made, a record of the court. *State v. King*, 5 Ired., 203. S. P., *State v. Ward*, 8 Ired., 530.

15. A judge, who by the general law and a permanent commission holds a term of the superior court, is not to require evidence that he is a judge of the court; and the record made by him establishes to those who succeeds him, that he held the court at the term at which, according to the purport of the record, he appears to have held it. *State v. Ledford*, 6 Ired., 5.

16. The regularity of the proceedings of a superior court in point of time, as in other things appearing on the record, is to be presumed, unless the contrary appears. *Ibid.*

17. It is the duty of every court to make its own record, and no other court can indirectly examine the manner in which it is made. *State v. Corpening*, 10 Ired., 58.

18. The acts of a ministerial officer, as a constable or sheriff, in making returns on warrants and writs, although required by law to be returned into a court of record, do not make a part of the record, are only *prima facie* taken to be true, and may be

contradicted and shown to be false, antedated, &c. *Patterson v. Britt*, 11 Ired., 383.

RECORDARI.

1. The writ of *recordari* in our practice may be issued to bring up proceedings before a justice, after judgment rendered, for either of two purposes; the one, and the most usual, is, to have a new trial of the merits, and this is in the nature of an appeal; the other is, for the purpose of reversing the judgments because of error, and this is in the nature of a writ of error, or writ of false judgment. *Leatherwood v. Moody*, 3 Ired., 129.

2. When a *recordari* in the nature of a writ of false judgment has been sued out and the plaint returned, the petitioner or plaintiff in the writ ought to assign his errors. *Ibid.*

3. If there be error in the proceedings, which does not appear on the plaint as recorded, the court, upon suggestion and a proper case made, will by *mandamus* order the justice to record it more fully. *Ibid.*

4. When no error is assigned, or none appears, the proper course is to dismiss the *recordari* and award a *procedendo*. *Ibid.*

5. Where the court orders the case to be put on the trial docket, it is tantamount to a refusal to dismiss the writ, and granting a new trial. *Ibid.*

6. The writ of *recordari* is the foundation of all the proceedings in a case of false judgment. Therefore, where a *recordari* was returned and heard upon affidavits, the court had a right to order the cause to be placed on the trial docket, and stand there as on a writ of false judgment. *Parker v. Gilreath*, 6 Ired., 221.

7. When a *recordari*, according to the common practice in our State, is brought with a view to have a new trial upon the facts, as it is a favor in the nature of an extension of the power of appeal, it must be applied for speedily, and any delay, after the earliest period in the party's power to apply, must be accounted for. But when it is used as the foundation for reviewing summary convictions, or other proceedings before inferior tribunals in a case of false judgment, it is in the nature of a writ of error, and in fact always lies as a matter of right. *Webb v. Durham*, 7 Ired., 130.

8. Where the *recordari* is to bring up the proceedings in a case of forcible entry and detainer, although the plaintiff may have entered no traverse before the justice, yet he shall be permitted to assign as many errors as he thinks proper. *Ibid.*

9. Where a party has not been deprived of his appeal from the

judgment of a justice, by any fraud, accident, surprise, or denial of his right by the justice, he is not entitled to a writ of *recordari*. *Satchwell v. Rispass*, 10 Ired., 365.

10. Where A placed in the hands of a constable a warrant against two defendants, and the same was served, and after several continuances a trial was had, and judgment given against one and for the other defendant, *it was held* that A was not entitled to a *recordari*, although he was detained by sickness from attending the first day appointed for the trial, and had no notice of the other proceedings, until too late for an appeal; for if the constable were not his agent, he ought to have attended or sent an agent, but if he were his agent then the neglect of the constable was, in law, his own. *Elliott v. Jordan*, Busb., 298.

11. A, against whom a justice had given a judgment in favor of B, prayed an appeal to the superior court, but the justice, being of opinion that an appeal would not lie to that court, entered the appeal to the county court; afterwards, at the instance of B, and without the knowledge of A, he changed the entry, so as to make the appeal returnable to the superior court, and returned the proceedings accordingly. In the superior court the appeal was dismissed, and afterwards on the application of A for a *recordari* to bring up the case to that court, *it was held* that A had under the act of 1850, ch. 1, a right to an appeal to either court, that the superior court ought not to have dismissed the appeal, and that A was entitled to the writ notwithstanding the judgment of dismissal. *Plummer v. Wheeler*, Busb., 472. (See Rev. Code, ch. 62, sec. 23.)

12. When an appeal is prayed from a judgment of a justice and is refused, the party is entitled to the writ of *recordari*, and when returned it may be used as a writ of false judgment. *Bailey v. Bryan*, 3 Jones, 357.

13. Where the merits of a case tried before a justice appear to have been in favor of the party against whom judgment was rendered, and there were circumstances tending to show fraud and collusion between the successful party and the justice, who were brothers, to deprive the other party of a fair trial, and of the right to appeal, *it was held* to be a proper case for a *recordari*, and for a new trial in the superior court. *Lancaster v. Brady*, 4 Jones, 79.

14. A writ of *recordari*, in the nature of false judgment, is the proper remedy for reviewing the action of commissioners in assigning property for an insolvent debtor, under the act, Rev. Code, ch. 45, secs. 8 and 9. *Ballard v. Waller*, 7 Jones, 84.

15. Where the president of a railroad company was informed that a suit was about to be brought against his company before a justice, and, believing that the claim was unjust, gave instruction to the most convenient station agent to attend the trial, and in case of a recovery against the company to appeal to court,

and the agent who was a diligent and faithful officer did attend and pray an appeal, but from ignorance of the law, failed to procure security for the appeal, *it was held* that the president of the company was not guilty of such laches as to deprive it of a right to the writ of *recordari*. *North Carolina Railroad Company v. Vinson*, 8 Jones, 119.

See (Executors and Administrators—Of their liability to creditors, &c., 112–113.) (Judgments—Of irregular, void and erroneous judgments, 37–38.) (Justices of the Peace—Of their jurisdiction, judgment and execution, 82.)

REGISTRATION.

1. The registration of a deed has relation back to the time of its delivery. *Clark v. Arnold*, 2 Hay., 287, (467.)

2. Under the act of 1792, a sheriff's bill of sale for a slave is like the bill of sale of any other person; and when the purchaser takes the actual possession of the slave, the bill of sale must be recorded in the county where he resides. *Palmer v. Popelston*, 1 Hawks, 307, S. P. *Underwood v. Lane*, 1 Dev., 173. (See Rev. Code, ch. 37, sec. 20.)

3. When a bill of sale for a slave is unnecessary, if one be given, the vendor therein shall not set up want of registration against the vendee's title, but the bill of sale, as between those parties, may be used as evidence of title, and the execution thereof may be proved on the trial, according to the rules of evidence in other cases of deeds; and this under the act of 1784. *Rhodes v. Holmes*, 2 Hawks, 193.

4. A bill of sale not registered within twelve months from the time of execution, if registered afterwards by virtue of an act giving further time for registration, shall not have relation back so as to defeat a levy made after the execution of the bill of sale, but at a time when the act giving further time had not been enacted. Such transactions, however, would be good as to all future transactions. *Scales v. Fenell*, 3 Hawks, 18. (Two years is the time now allowed for the registration of bills of sale for slaves. (See Rev. Code, ch. 37, sec. 19.)

5. Where a grant was made in 1818, and registered, but at what time did not appear from the certificate, the court will permit it to be read, although a period intervened, between 1818 and 1821, when no law was in force allowing further time for the registration of grants; unless it be shown that some right vested, between the time within which the grant should have been registered and the time when the act of 1821, allowing

further time, went into operation. *Haughton v. Rascoe*, 3 Hawks, 21.

6. Notwithstanding deeds of gifts for slaves are required to be registered within one year after their date, yet if registered within the time prescribed by the acts allowing longer time for that purpose, they are valid. *Jones v. Sasser*, 3 Dev. 378, S. P. *Gregory v. Perkins*, 4 Dev. 50.

7. A registration of a deed in trust, made upon proof of its execution by an attesting witness, who was interested under it, is valid. *Jones v. Ruffin*, 3 Dev., 404.

8. An absolute deed, with a parol *proviso* for its redemption, is not avoided by the act of 1820, for want of registration within six months, as that act applies only to deeds which are securities on their faces. *Gregory v. Perkins*, 4 Dev., 50, S. P. *Walton v. Stallings*, 4 Dev., 56.

7. The non-registration of the separate declaration of the trusts of a mortgage does not affect it, except as to the trusts thus declared. *Skinner v. Cox*, 4 Dev. 59.

10. The acts of assembly, which require grants to be recorded in the secretary's office, do not impose upon the grantee the burthen of showing affirmatively that it has been done. The non-recording, if an available objection at all, must be shown by him who makes it. But it seems that such an objection is not available at all. And, certainly, slight and immaterial mistakes in the recording of a grant will not avoid it. *VanPelt v. Pugh*, 1 Dev. and Bat., 210. (See Rev. Code, ch. 42, sec. 22.)

11. The act of 1829 differs from that of 1820, in that the latter makes deeds in trust void, unless registered within six months, and there is nothing in it to denote that any thing short of a complete registration, by fully transcribing the instrument into the books of the register, is to be a registration, or to constitute a part of it; but the former does not avoid a deed of trust for want of registration at any particular time, but declares that it shall not operate "but from" the registration; and that is deemed to be done on the day of its delivery to the register, as noted by him on the deed. *McKinnon v. McLean*, 2 Dev., and Bat., 79. (See Rev. Code, ch. 37, sec. 22, which re-enacts the act of 1829, but omits that of 1820.)

12. Schedules annexed to a deed in trust, and referred to therein, are parts thereof and must be registered; but such registration will be taken as having been made on the day when the deed itself is deemed to have been registered. *Ibid.*

13. A deed in trust, admitted to registration upon a probate by an incompetent witness, is not, therefore, void for want of probate and registration, but will be received in evidence on a trial, if it be then proved by competent testimony. *Ibid.*

14. The probate of a deed is *ex parte* and does not conclude, except as to the *factum*, and the identity of the witness. The

deed may still be shown to be a forgery, or to have been executed by an infant or a *feme covert*. *Ibid.*

15. If two or more distinct acts are necessary to give validity to a deed, both must be performed, and one cannot be connected with the other; as in the case of probate and registration, the latter cannot relate in point of time to the former. But, where, as in the case of registration alone, there is necessarily more than an instant consumed in the performance of a single act, the whole is one continuing act, and is, therefore, in legal contemplation, done from the commencement. *Ibid.*

16. The act of 1829 was taken from the English annuity act, and must therefore be construed like that act. *Ibid.*

17. It is a maxim that in law there is no fraction of a day; yet that doctrine no longer prevails, where it becomes essential for the purposes of justice to ascertain the exact hour or minute when particular acts were done. Therefore, where a deed in trust was proved and delivered at a certain hour of the day to the register, who immediately commenced the registration thereof, but without endorsing on the deed the time when it was delivered to him, and two hours afterwards on the same day a justice's execution was levied upon the property conveyed in the trust, *it was held* that the hour at which the deed was delivered to the register for registration might be proved by parol evidence, and that it had priority over the levy under the execution. *Metts v. Bright*, 4 Dev. and Bat., 173.

18. The act of 1829 directs the register to endorse on each deed of trust the day when it is delivered to him for registration, and that such endorsement shall be entered on the register's books and form a part of the registration; but an omission by the officer to perform that duty, although he is liable to an action and an indictment for such neglect, will not render the registration invalid; but it is questionable whether, in such case, the registration can refer back to an antecedent day by means of parol evidence of the time when the deed in trust was delivered to the register. *Ibid.* (See Rev. Code, ch. 37, sec. 23.)

19. The registration of a deed in trust is deemed to be complete from the time when the register commences it. *Ibid.*

20. A lease of land for a term of years need not be registered. *Wall v. Hinson*, 1 Ired., 276. (They are now to be registered when required to be in writing. See Rev. Code, ch. 37, sec. 26.)

21. Where the purchaser of a slave has two different places of residence in two different counties, the registration of his bill of sale in either of those counties is sufficient. *Carter v. Spencer*, 7 Ired., 14.

22. The passage of the several acts of assembly prolonging the time, within which grants shall be registered, makes them good and available by relation back, from the time when they

are dated, as much so as if they had been registered within the first two years. *Hill v. Jackson*, 9 Ired., 333.

23. Where, from the certificate of the probate of a deed for registration, it only appeared that the witness swore in general terms, that the signature of the party was in his handwriting, but he did not state upon what grounds he formed his opinion, nor by what means he had acquired a knowledge of the handwriting of a party, *it was held* that this evidence gave no authority to grant an order of probate for the purpose of registration. *Carrier v. Hampton*, 11 Ired., 307.

24. The probate of a deed of trust or mortgage, under the act, Rev. Stat., ch. 37, sec. 25, is not valid when taken by one who, though acting as deputy clerk, has not been duly appointed nor qualified by taking the oaths to support the constitution of the United States, and of this state, and an oath of office, as prescribed by the Rev. Stat., ch. 19, sec. 15. A registration therefore, under such a probate, has no effect in rendering such a deed operative under the provisions of the first recited act. *Suddereth v. Smyth*, 13 Ired., 452. (See Rev. Code, ch. 37, secs. 2 and 22, and ch. 19, sec. 15.)

25. Terms for years in land being only chattel interests, deeds for them are not required to be registered; therefore, if that should be done voluntarily, a copy of such deed certified by the register is not evidence. *Burnett v. Thompson*, 3 Jones, 113. (Leases for land are now required to be registered; see Rev. Code, ch. 37, sec. 26.)

26. The act of 1824, which converted the long terms for years granted by the Tuscarora Indians into real estate, and making them transmissible as such, does not make good a registration of such lease made before its passage; and consequently, a certified copy of such a registered deed of lease is not admissible in evidence. *Ibid.*

27. As to deeds executed in this state, there is generally no statute which requires the register to put on his books the fact that the deed was *duly proved*, or which authorizes him to give a certificate in regard to such probate. But where the grantor or the subscribing witness resides abroad, and a commission issues to take the acknowledgment or probate of the deed, the act requires the *dedimus* and *certificate of acknowledgement or probate*, as well as the deed itself, to be registered. *Freeman v. Hatley*, 3 Jones, 115. (See Rev. Code, ch. 37.)

28. Where the buyer and seller of a slave both lived in the same county when the bill of sale was executed, but during the year the buyer sent the slave to another county where he had a plantation, to which he afterwards removed and where he thenceforward resided, *it was held* that the bill of sale was properly registered in the latter county. *Simpson v. Morris*, 3 Jones, 411.

29. If a deed be registered without having been acknowledg-

ed, or proved and ordered to be done so, the registration is of no avail and the deed cannot be read in evidence. *Williams v. Griffin*, 4 Jones, 31.

30. A deed conveying slaves as a gift, but reserving "enough of the hire of the said slaves comfortably to support" the donor, is not a deed in trust, but a deed of gift, and is not required to be registered within six months after its execution. *Gordon v. Wilson*, 4 Jones, 64.

31. The act of 1854, ch. 19, which extended the time for registering deeds of gift to two years, applied to one executed the 8th of April, 1853, the year during which it ought to have been registered under the previous act, (Rev. Stat., ch. 37, sec. 17,) not having then expired. *Ibid.*

32. A deed in trust, to secure property to the separate use of a wife, is not such a deed in trust as is required to be proved and registered within six months. *Green v. Kornegay*, 4 Jones, 66.

33. The certificate of a clerk, endorsed upon a deed, or attached to it, showing that it was proved before him in his county, with an order for registration, is sufficient to support the registration, though the certificate does not state that the probate was taken in his office, or that it was recorded. *Johnson v. Pendergrass*, 4 Jones, 479.

34. Where a deed in trust executed in another state, conveying land and other property situate in this state, was acknowledged before a commissioner for this state resident in the other state, and, on being presented to the clerk of the county court of the county where the property was situated, was adjudged by him to have been duly proved, and was by him ordered to be registered, and was registered, *it was held* that the probate and registration were proper, and the instrument duly authenticated. *Simmons v. Gholson*, 5 Jones, 401. (See Rev. Code, ch. 37, sec. 2.)

35. The registration of a marriage settlement, embracing the slaves of the *feme*, must under the act, Rev. Code, ch. 37, sec. 24, be made in the county where the *feme* resided and the slaves were at the time when the instrument was executed. *Latham v. Bowen*, 7 Jones, 337.

36. Where a deed of marriage settlement was attested by two subscribing witnesses, and an order of registration was made by a judge on the oath of a person, who signed as a third subscribing witness on the acknowledgment of the *feme* after marriage, *it was held* that this was a sufficient compliance with the formal requirements of the act, *as to the registration*; but that, on a trial about the property conveyed, the deed had to be proved by the other subscribing witnesses. *Ibid.*

37. Where the probate of a deed and an order of registration are regular on its face, no objection to the registration can be

made by going behind it and showing that the witness, on whose oath it was made, was incompetent. *Ibid.*

38. Slight and immaterial mistakes in the registration of a deed of gift for slaves will not avoid it. *Hughes v. Debnam*, 8 Jones, 127.

See (Husband and Wife—Of marriage settlements and agreements, 1-3-5-6.)

RELEASE.

1. A receipt and acquittance under seal, contained in a bill of sale for slaves, has the effect of a release, and estops the vendor from explaining or contradicting by parol the payment of the purchase money. *Lowe v. Weatherly*, 4 Dev. and Bat., 212.

2. An instrument under seal executed by the plaintiff to the defendant in a suit, in which the obligor "agrees and binds himself to dismiss the suit and pay the costs," though it also contains a deed for the land in controversy between them, and a covenant to surrender a bond for title to the same land, is nevertheless a *release* of the pending cause of action, and may be pleaded as such *pais darrein continuance*. *Stinson v. Moody*, 3 Jones, 53.

3. Although one, whose estate is divested and turned to a *mere right*, cannot transfer such right by deed to a stranger, yet he may release it to the person in possession. *Williams v. Council*, 4 Jones, 206.

4. One who contracts for land, and stipulates that the title shall be made to a trustee for the benefit of his wife when the purchase money shall be paid, and who enters and holds as tenant to the vendor, has no legal right that he can convey, or that can be sold under execution, and the only effect, that his deed or that of the sheriff can have, will be to put the purchaser from him into possession, so as to make him capable of receiving a release. *Ibid.*

5. Where one of two partners, who had entered into a contract to do a job of work according to specifications, executed an instrument under seal, certifying that the contract was forfeited on their part, and there had been a settlement and payment to him of a certain sum as "a present," *it was held* that the instrument amounted to a release, and took away the cause of action as to both partners. *Gates v. Pollock*, 5 Jones, 344.

6. A receipt being given by a ward to his guardian for a certain sum of money and certain named slaves, to which was added as follows: "and I hereby release for myself, &c., all claim and de-

mand in relation to the same money and negroes afore mentioned by name, either in law or equity;" and *it was held* that the release did not embrace a claim against the guardian for the loss of a slave not named in the receipt, caused by his improper conduct. *Harrell v. Lee*, 6 Jones, 280.

7. An instrument in writing, purporting to release one of the parties to a suit for assault and battery, from all claim and demand on him in that suit, but not having a seal, cannot operate as a release. *Smithwick v. Ward*, 7 Jones, 64.

8. An acknowledgment by the bargainor in a deed, that he has received the consideration money, is in law a release thereof, and, as such, is a bar to an action for the recovery of the same. *Mendenhall v. Parish*, 8 Jones, 105.

See (Deed—Of the consideration, 3.) (Widow—Her interest in the personal estate of her husband, 3.)

RELIGIOUS CONGREGATION.

See (Indictment—When an indictment will lie, 35-43-48.)
(Indictment—Variance between the allegation and proof, 5.)

RELIGIOUS SOCIETIES.

1. Religious societies, or their trustees, have not by the act of 1796 a general capacity of acquisition, and they can take only for the use of the society. Hence, a conveyance of slaves to the trustees for purposes forbidden by the policy of the law, passes nothing; and this unlawful purpose may be shown by a stranger, to avoid the deed, in an action against him. *Trustees v. Dickenson*, 1 Dev., 189.

2. Where a conveyance of a certain tract of land is made to A, B and C as trustees for the Methodist Episcopal church, a suit of trespass *quare clausum fregit* may be brought by A, B and C against the wrongdoers, though they may not have been appointed trustees according to the act of assembly in relation to the appointment of trustees by religious congregations. *Walker v. Fawcett*, 7 Ired., 44. (See Rev. Code, ch. 97, sec. 3.)

3. In such case the title is vested in them individually, and they may recover at law, though in the writ and declaration

they style themselves "trustees;" for that word may be rejected as surplusage. *Ibid.*

4. It is only when a suit is brought by persons who claim as "successors" that the question arises, whether the original bargainees were duly chosen the trustees of a religious congregation, and whether the persons suing were also duly chosen trustees, so as to give them legally the character of "successors" to the former, and thereby vest in them the title to the property, which is necessary to support an action. *Ibid.*

REMAINDER.

1. There can be no remainder after a life estate created by deed in slaves or other personal chattels; the conveyance for life carries the absolute property. *Cutlar v. Spillar*, 2 Hay., 130, (295.) S. P., *Gilbert v. Murdock*, *Ibid*, 182, (380,) *Dowd v. Montgomery*, 2 Car. L. R., 100, (198,) *Graham v. Graham*, 2 Hawks, 322, *Foscue v. Foscue*, 3 Hawks, 538, *Sutton v. Hallowell*, 2 Dev., 185, *Morrow v. Williams*, 3 Dev., 263. (Altered as to slaves. See Rev. Code, ch. 37, sec. 21.)

2. A man by a deed "lent to his sister a negro slave and her increase during her natural life," and at her death gave the said slave and her increase unto the heirs of the said sister lawfully begotten of her body, forever:" *held* that the slaves vested absolutely in the sister. *Nichols v. Cartwright*, 2 Murph., 137. (See Rev. Code, ch. 37, sec. 21.)

3. Where a slave was conveyed, before the alteration in the law, to A in trust for himself for life, with remainder over, *it was held* that the whole interest vested absolutely in A, and the limitations over could not take effect; for a man cannot hold in trust for himself, and the conveyance to him created an estate for life, which in chattel property was the whole interest. *Butler v. Gadley*, 1 Dev., 94.

4. Slaves were before the act of 1823 limited by deed to a woman "and her children at present living, and those she may hereafter have, to have to her in manner aforesaid for life, and afterwards to her present children and any which may hereafter be born;" *held* that the limitations being in succession, the mother took the whole interest. *Smith v. Tucker*, 2 Dev., 541.

5. A limitation over of slaves by will, after a bequest for life, becomes, upon the executor's assent, a vested legal estate, which may be assigned, and which cannot be destroyed by any act of the legatee for life. *Burnett v. Roberts*, 4 Dev., 81.

6. A gift by deed of a slave, reserving a life estate in the

donor, passes no interest to the donee at common law. And a deed of bargain and sale of a slave for the life of the bargainee, in consideration of an annuity to the bargainor, conveys the entire interest to the bargainee. *Hunt v. Davis*, 3 Dev. and Bat., 42. (Altered as to slaves. See Rev. Code, ch. 37, sec. 21.)

7. A lease for life of a chattel, if made by deed, is subject to the same construction as a conveyance for life; and no remainder is left at common law in either case. *Ibid.*

8. The statute of Virginia which provides that, "if any person or persons, possessed of a life estate in any slave or slaves, shall remove, or voluntarily permit to be removed, out of this commonwealth, such slave or slaves, or any of their increase, without the consent of him or her in remainder or reversion, such person or persons shall forfeit any such slave or slaves so removed, and the full value thereof, unto the person or persons that shall have the remainder or reversion," cannot apply to any case except where there is a tenant for life with a *vested remainder or reversion* thereon dependent. *Allen v. Pass*, 4 Dev. and Bat., 77.

9. Where a deed of gift conveys the immediate, absolute and entire interest in a slave, an endorsement made thereon by the donee, at the same time when the deed was executed, stipulating that the slave "may be at the disposal of the donor during his life," will not operate as a reservation of a life estate by the donor, but will be regarded, *at law*, only as an executory covenant on the part of the donee, that the donor, during his life, shall have the enjoyment of the slave, for the breach of which covenant the donee will be answerable in damages; though, *in equity*, the donor would probably be regarded as taking an interest for life. *Hooper v. Hooper*, 4 Dev. and Bat., 150.

10. A limitation in a deed, by a donor, of slaves to himself for life, "and after his death, in the event of his having no heirs," to his niece, is, by the operation of the act of 1823 in connection with that of 1827, or, by the former and the principles of the common law independent of the latter act, valid, and vests a title to the slaves in the niece, upon the death of the donor without children. *Tillman v. Sinclair*, 1 Ired., 183. (See Rev. Code, ch. 37, sec. 22, and ch. 43, sec. 3.)

11. A grantor, by a deed dated in 1833, conveyed a certain slave to her son-in-law B., and her daughter T., till her granddaughters, M. and S., attained the full age of twenty-one years, or married; and if B. died before the expiration of that period, leaving his wife, then the right to vest in her until the age of twenty-one years, or the marriage of M. and S.; if the said T. died before her husband, then the whole property to vest in the said M. and S., to be equally divided between them as tenants in common, and from and after the full age of twenty-one years, or the marriage of the said M., then the one-half of the said property to be equally divided and delivered to the said M., her

heirs, &c., and after the full age of twenty-one years, or marriage of the said S., the other half of the said property to be divided and delivered to her, her heirs, &c., and if either M. or S. should die without leaving lawful issue, the property to go to the survivor; and if both die without leaving lawful issue, then to return to the grantor: *Held* that as the limitations in the deed, by force of the act of assembly, must be construed as an executory devise in a last will would be, the granddaughter M., on her marriage, became a tenant in common with the son-in-law B., though the other granddaughter S. was still under age and unmarried. *Bonner v. Latham*, 1 Ired., 271. (See Rev. Code, ch. 37, sec. 32.)

12. Where, by a deed of gift made after the act of 1823, the donor conveyed a female slave to B, and then added, "that is, after my decease, to have and enjoy unto the said B, her heirs and assigns," &c., *it was held* that, by the operation of the act referred to, the issue of the female slave, as well as the slave herself, passed to B, in the same manner as if a life estate had been given by will to one with a remainder over to another person. *Baldwin v. Joyner*, 7 Ired., 123.

13. Under a deed of gift of slaves, before the act of 1823, to A in trust for B for his life and after his death to A absolutely, *it was held* that the life estate in B, being but a trust estate not noticed by the common law, did not absorb the whole interest in the slaves, and that A was entitled to them after his death. *Lewis v. Lewis*, 1 Jones, 444.

14. In a deed of gift of slaves from a grandfather to his grandchild, after the granting clause was the following: "reserving nevertheless unto myself and unto my wife M the use of the said granted negroes during the term of our natural lives;" *it was held* that the legal effect of the deed was to vest an estate in the grantor for life, then in his wife for her life, and then in the granddaughter. *Murphey v. Merritt*, 3 Jones, 37, S. P., *Parish v. Merritt*, 3 Jones, 38.

15. The owner of a remainder in chattels cannot have an action of trover or trespass on the case against a sheriff, who has an execution against the owner of the particular interest, for selling it, although he may profess to sell the entire property in such chattels, because only such interest as the debtor has will pass by the sale. *Homesley v. Hogue*, 4 Jones, 481.

16. A grant or gift of chattels, other than slaves, with a reservation of a life estate to the grantor or donor, passes nothing. *Lance v. Lance*, 5 Jones, 413.

17. Where slaves were limited, by a deed executed in 1844, to A, her heirs and assigns, and in case she should die before she has an heir of her body, then B shall have and possess the same as though they had not been given as aforesaid to A, *it was held* that

on the death of A, without having had issue, the limitation to B was valid. *Holden v. McAllister*, 6 Jones 12.

18. The remainderman of an estate in a slave cannot maintain assumpsit on a contract made by the tenant for life with a hirer for the protection of the slave's life, he not being privy thereto, and no part of the consideration having moved from him. *Bogle v. North Carolina Railroad Company*, 6 Jones, 419.

19. A deed of gift of slaves, made before the act of 1823, to one for life with a remainder over, operated to convey the absolute interest to the first taker. *Harrell v. Davis*, 8 Jones, 359.

REMITTER.

1. Where slaves were given to A during her coverture with B, and put into their possession, and after the death of B his administrator C, believing A had a right, returned the possession to A, who claimed them as her own and retained the adverse possession for two years, and then conveyed them to C in his own right, *it was held* that after termination of the bailment to A, and her delivery of the slaves to C, he was remitted to his original right, and held the slaves as the administrator of B, and that, on the death of C, the administrator *de bonis non* of B was entitled to recover the slave. *Williams v. Wilson*, 10 Ired., 482.

2. The principle of remitter applies to a case where one having a wrongful possession has the title thrown on him by the act of law, but not where he acquires the title by his own act. *Williams v. Council*, 4 Jones, 206.

REMOVAL.

See (Fraud—In the removal of debtors.) (Practice—Removal of causes.)

REPLEVIN.

1. Where a writ of replevin was sued out against the defen-

dant, who had been in quiet possession of the slave for many years, merely to try the right of the parties to the slave, it was quashed as being irregular, wrongful and oppressive. *Wrenford v. Gordon*, Mar. 54, (51.)

2. Replevin cannot be supported unless a *taking* is proved. *Cummings v. McGill*, N. C. Term R. 98, (535,) S. C. 2 Murph, 357.

3. Where an action of replevin is brought to recover possession of a slave in which only a third person's life estate is claimed, and the tenant for life dies pending the action, the plaintiff is only entitled to recover the value of the life estate and damages for the detention. *Barham v. Massey*, 5 Ired., 192.

4. In an action of replevin, if the defendant wish to put in issue the title of the plaintiff, he must plead that the title is in himself or some other person by whose authority he took the property. Where the plea is *non cepit*, &c., the plaintiff's title is not denied. *Rowland v. Mann*, 6 Ired., 38.

5. In an action of replevin for slaves, the jury, if they find for the plaintiff, must in their verdict assess the value of each slave. *Ibid.*

6. The action of replevin will not lie, either at the common law, or under our statute, against an officer who seized a slave by virtue of an execution. *McLeod v. Oates*, 8 Ired., 387. (See Rev. Code, chap. 98.)

7. The act of assembly in relation to replevin does not repeal or supersede the common law remedy of replevin. At the common law, the action could not be maintained unless there was an actual taking; while under the act, taking is not necessary to entitle the party injured to his remedy. *Duffy v. Murrill*, 9 Ired., 46.

8. Where an execution issues against A and is levied *bona fide* on property in the possession of B, on the allegation that the property is really in A, the action of replevin will not lie against the sheriff. *Carroll v. Hussey*, 9 Ired., 89.

9. In an action of replevin under the statute, Rev. Stat., ch. 101, if the plaintiff be nonsuited, the defendant cannot have a judgment for damages assessed by the jury, but only a judgment for the thing replevied and costs. At common law, in such a case the judgment was for the return merely. *Pannell v. Hampton*, 10 Ired., 463. (Defendant may now in certain cases have his damages assessed, and a judgment therefor. See Rev. Code, ch. 98, sec. 3.)

10. Where a defendant in an action of replevin, upon a recovery had against him, pays the damages assessed for the value of a female slave, it is a judicial transfer to him of such slave under the Rev. Stat., ch. 101, sec. 5, but not of a child she had after the wrongful taking and during the pendency of the suit. *Houston v. Bibb*, 5 Jones, 83. (The 5th sec. of the 101st ch. of the Rev. Stat is omitted in the Rev. Code, ch. 98.)

11. In an action of replevin on the act, Rev. Code, ch. 98, sec. 3, (which directs that where a slave, taken under the process, has been delivered to the plaintiff and he fails to recover, either by being non-suited, or by a verdict being rendered against him, there shall be an enquiry of the value of the slave and of the damages for detention;) *it was held* to make no difference whether a non-suit was ordered because there was no caption, or because property out of the defendant was not proved. *Eborn v. Waldo*, 6 Jones, 438.

12. As against wrongdoers and trespassers, a paramount legal title outstanding in some person unknown will be no bar to a recovery in replevin, by one having the possession and a right of possession, coupled with the beneficial interest in the chattel. *Freshwater v. Nichols*, 7 Jones 251.

RESCUE.

See (Indictment—When an indictment will lie, 21.) (Indictment—Of the trial, verdict and judgment, 57.)

RETAILERS OF SPIRITUOUS LIQUORS.

1. The 75th and 77th sections of the 34th chapter of the Revised Statutes, which, after prohibiting the selling of spirituous liquors to slaves, and making the offence indictable as a misdemeanor, prescribes that "if it shall appear on the trial that the defendant is a licensed retailer of spirituous liquors by the small measure, he shall also forfeit his retailer's license, and shall be incapable of taking a new license for the space of two years from and after the date of his conviction," mean, that the defendant shall be a retailer at the time of the offence committed, and not at the time of the trial; and the fact of his being such retailer is not to be ascertained on affidavits or otherwise by the court, but must be averred in the indictment and confessed, or found to be true by the verdict of a jury. *State v. Plunkett*, 1 Ired., 115. (See Rev. Code, ch. 34, secs. 87 and 89.)

2. On an indictment for retailing spirits by the small measure without a license, where the contract appeared to be, to deliver to the purchaser from time to time spirits in parts of a quart as

he should call for them, with an engagement on his part, to take in the whole, a quart in quantity, and an engagement on the part of the seller not to exact payment until that quantity should be received, *it was held* that the transaction was a violation of the act which prohibits the sale of spirituous liquors by the small measure without a license. *State v. Kirkham*, 1 Ired., 384.

3. Where in such a case a special verdict was found, which did not state *that the selling was without license*, judgment must be rendered for the defendant; for such an averment is necessary in an indictment under the act, and a special verdict must be found by the jury. *Ibid.*

4. The justices of the county court are not bound to grant a license to retail spirituous liquors to every one who proves himself of good moral character; nor have they, on the other hand, the arbitrary power to refuse, at their will, all applicants for license who have the qualifications required by the statute. They have the right to exercise only a sound legal discretion, referring itself to the wants and convenience of the people, to the particular location in which the retailing is to be carried on, and the number of retailers that may be required for the public accommodation. *Attorney General v. Justices of Guilford*, 5 Ired., 315. (See Rev. Code, ch. 79, sec. 6.)

5. An act of assembly, requiring a citizen of a town to get permission from the commissioners thereof to retail spirituous liquors within its limits, does not confer the right to retail; but the applicant must also get a license to retail from the county court, and such court license will protect him, though it runs beyond the time embraced in the permission of the commissioners. *Parsley v. Hutchins*, 2 Jones, 159.

6. A license to retail spirituous liquors by the small measure, granted for one year to two persons as partners in trade, will, during the year, protect one of the partners against the penalty for retailing, although the other may have retired from the firm. *State v. Gerhardt*, 3 Jones, 178.

7. A town may be named in the license, as the place where the business of retailing may be carried on; but the person obtaining it cannot sell spirits under it at more than one place in the same town. *Ibid.*

8. Under the act Rev. Code, ch. 79, sec. 4, forbidding a retailer or ordinary keeper from crediting to a greater amount than ten dollars for "liquor" sold, champagne wine is included. *Kizer v. Randleman*, 5 Jones, 428.

9. A person licensed to retail spirits may lawfully employ an agent to conduct the business for him, although he may leave the country for an indefinite time, for instance, as a soldier to serve for three years or the war. But, *it seems*, that he cannot assign his license. *State v. McNeely*, 1 Winst., 234.

See (Act of Assembly, 13.) (Indictments—Form and matters

relating thereto, 60-98.) (Indictment—Plea of former acquittal or conviction, 14.) (Indictment—When an indictment will lie, 92-93.) (Evidence—In criminal proceedings and indictments, 29.)

RETAINER.

See (Executors and Administrators—Executors *de son tort*, 6-8.) (Executors and Administrators—Of their liability to creditors, and herein of suits against them and their defence, 8-9-13-51.)

REWARD.

1. Where an action of assumpsit is brought by a plaintiff to recover the amount of a reward, offered by the defendant for the apprehension and delivery in jail of a person charged with a criminal offence, it is incumbent on the plaintiff to prove that he either compelled the person by force, or induced him by persuasion, to surrender. If the surrender was wholly voluntary, although the plaintiff accompanied the person to the jail, and saw him lodged there, he has no right of action. *Currie v. Swindall*, 11 Ired., 361.

2. Where an agent was authorized to offer a reward for the apprehension of an individual, it is only necessary to prove that it was done, as the mode of doing it is entirely immaterial. *Ibid.*

3. Assumpsit for the reward offered by the following advertisement for the apprehension of a stolen negro and the felon: "A reward of \$100 for the apprehension of both, or \$50 for the negro, out of the State; \$25 for the apprehension of the negro within the State, and his delivery to the subscriber, or for keeping him so that his owner gets him again;" *it was held* that the reward of \$100 was offered only for the apprehension of the felon and the negro, if taken out of the State, and \$25 for the negro if taken within the State. *Washburn v. Humphreys*, 13 Ired., 88.

RIOT.

See (Indictment—When an indictment will lie, 36.) (Indictment—Form and matters relating thereto, 31–104–129.) (Indictment—Of the trial, verdict and judgment, 6.) (Evidence—In criminal proceedings and indictments, 107.)

RIVERS AND CREEKS.

1. The English test for determining whether a river is navigable or not, to wit, the ebb and flow of the tide, is not applicable in this State; hence a stream sixty yards wide, eight feet deep and with an unobstructed navigation for sea vessels from its mouth to the ocean, was held to be a navigable stream; and that its edge at low water mark was the boundary of the adjacent land. *Wilson v. Forbes*, 2 Dev., 30. S. P., *Ingram v. Threadgill*, 3 Dev., 59.

2. Where a river or creek is not navigable in the ordinary meaning of the term, the riparian owners have a several fishery opposite to their land, to the middle of the stream. And, *it may be so*, also, as to a fishery in a river which is not affected by the ebb and flow of the tide, but which is in fact navigable. This point, however, is not determined. *Ingram v. Threadgill*, 3 Dev., 59.

3. Each owner of land, through which an unnavigable stream flows, has a right, by the common law, in consequence of such ownership, to apply the water on his own land, to the purposes of profit. *Pugh v. Wheeler*, 2 Dev. and Bat., 50.

4. In making such application, he is at liberty at all times to avail himself of such advantages as his particular situation affords, respect being had to the rights of other proprietors, either above or below him, on the same stream; and no other proprietor either above or below him, can make any appropriation of the stream, so as to curtail or diminish his use of all his natural advantages, whether such appropriation was prior to his use or not; unless, if the appropriation were prior, it was for such a length of time as to raise the presumption of a grant. *Ibid.*

5. Ponding a stream so as to throw the water over the land of a proprietor above, which the water did not cover before, gives him a good cause of action at any time when he may wish to use his land, unless he has granted the easement, either *actually*, or *by presumption of law* from the length of time he has permitted the easement to be enjoyed. *Ibid.*

6. When the parties claim respectively upon their possession as in the case of prescriptive rights, the application of the water of a stream to some particular and useful purpose, is an appropriation of it, which gives the right to the perpetual use of it in the same way, against all persons who may not have previously applied it to some other use inconsistent therewith. *Ibid.*

7. There is no prior or posterior in the use of the water by the owners of the land on a stream; and the priority of a particular new application, or artificial use of the water does not, therefore, create the right to that use; but the existence or non-existence of that application at a particular time measures the damage incurred by the wrongful act of another, in derogation of the general right to the use of the water, as it passes to, through or from the land of the party complaining. *Ibid.*

8. What is a navigable stream in this State does not depend upon the common law rule; but waters, which are sufficient in fact to afford a common passage for people in sea vessels, are to be taken as navigable. *Benbury v. Collins*, 3 Ired., 277.

9. All waters, which are actually navigable for sea vessels, are to be considered navigable waters under the laws of this State. *Collins v. Benbury*, 5 Ired., 118.

10. That "all waters which are actually navigable for sea vessels, are to be considered navigable waters, without regard to the ebb and flow of the tide, and that no one is entitled to the exclusive right of fishing in any navigable water, unless such right be derived from an express grant from the sovereign power, or, perhaps, by such a length and kind of possession, as will cause a presumption of such grant to arise" must now be deemed the settled law of this State. *Fagan v. Armistead*, 11 Ired., 433.

11. The legislature having by several acts declared the Neuse river between certain points a navigable stream, it is a nuisance to build a bridge across it between those points so as to obstruct the free navigation of it; and if there be such a nuisance created, it may be abated by any person whatever. *State v. Dibble*, 4 Jones, 107.

12. The right of navigation in a river or other navigable stream is of most importance to the public weal, and is, therefore, paramount to all conflicting rights. *Davis v. Jerkins*, 5 Jones, 290.

ROADS.

See (Highway.)

ROBBERY.

1. The snatching a thing unawares is not considered a taking by force; but if there be a struggle to keep it, or any violence done to the person, the taking is a robbery. Hence, *it was held* to be a robbery when the prosecutor accidentally dropped his pocket book in the presence of the prisoner, who immediately took up a \$100 bank note which had fallen out of the pocket book, and refusing to deliver it, caused a struggle which resulted in the prisoner's retaining and running off with the bank note. *State v. Trexler*, 2 Car. L. R. 90, (188.)

2. Where it appeared that while the prosecutor and the prisoner were examining a bank note which the latter had produced, the prosecutor felt the prisoner's hand in his pocket on his pocket book, and immediately seized his arm, whereupon the prisoner snatched the bank note, and a scuffle ensued, in which the prosecutor was thrown down and the prisoner escaped with the pocket book and bank note; *it was held* by PEARSON J. against the opinion of BATTLE J that it was no robbery but only a larceny. *State v. John*, 5 Jones, 163.

See (Indictment—Form and matters relating thereto, 132–133 134–135.) (Indictment—Plea of former acquittal or conviction, 4.) (Evidence—In criminal proceedings and indictments, 68.)

ROUTE.

See (Indictment—In what cases an indictment will lie, 36.)

RULES.

See (General Rules.) (Practice—References, motions, orders, rules and notices.)

SABBATH BREAKING.

See (Indictment—When an indictment will lie, 58–71.) (Indictment—Form and matters relating thereto, 29.)

SALARIES AND FEES.

See (Costs—What costs to be taxed, 1-2-3-9-13.) (Guardian and Ward—Of the liability of guardians and their sureties, 6.) (Jury—Liability of jurors for non-attendance.) (Recognition, 13.) (Militia, 21.) (Sheriff—Compensation to sheriffs.)

SALVAGE.

1. One who takes up a boat adrift on a river is entitled to salvage. *Windsor v. Walker*, Mar. 74, (77.)

2. But this right is only to be enforced by detention of the boat, and cannot be transferred to the purchaser of the property. *Winslow v. Walker*, 1 Hay., 192, (221.)

SATISFACTION.

See (Accord and Satisfaction.) (Judgment—Of the satisfaction of judgments.)

SCIRE FACIAS.

See (Bail—Proceedings against bail.) (Judgment—How a judgment is proved, and of a *scire facias* to revive it. (Pleading—Of *scire facias* and the pleadings thereon.) (Practice—*Scire facias*.)

SCHOOLMASTER.

See (Common Schools, 4-5.) (Indictment, 39.)

SEDUCTION.

1. In an action by a father for the seduction of his daughter, the relation of master and servant must subsist actually, or constructively; and if the daughter be of full age and do not reside with her father, the action cannot be maintained, although she occasionally visits him, and is seduced while going to his house on one of these visits. *Phipps v. Garland*, 3 Dev. and Bat., 44.

2. A father can maintain either an action on the case or an action of trespass, for the seduction of his daughter living with him or being under his control, whether she be of age or not; and where pregnancy is the consequence of the seduction, it is not necessary for him to wait till the birth of the child to entitle him to full damages. *Briggs v. Evans*, 5 Ired., 16.

3. The action rests upon the assumed relation of master and servant, and not upon that of parent and child; but an actual contract for services between the father and his daughter need not be proved, even though she be of full age, as it will be presumed from the slightest services rendered by her in the family. *Ibid.*

4. An action by a father for the seduction of his daughter will not lie, when the daughter is of full age and not living in her father's family, but in the actual employment of another person, though her father was to receive part of her wages. *McDaniel v. Edwards*, 7 Ired., 408.

5. In an action by a father for the seduction of his daughter, it is no defence that the daughter consented willingly to the seduction, or even that she, in fact, seduced the defendant, her consent not depriving the plaintiff of his right of action. *McAuley v. Birkhead*, 13 Ired., 28.

See (Abatement—By the death of parties, 7.)

SET OFF.

1. In an action of debt on a sealed note, if the plaintiff of record is merely nominal, and the real interest in the note is in another person, a set off against the latter may be admitted in evidence. *Stanly v. Green*, Mar., 60, (56.) (Overruled; see *Woffard v. Greenlee*, Conf. Rep., 79, (212).)

2. Where a set off is pleaded, if the plaintiff wish to avoid it on the ground of its being out of date, he must reply the statute of limitations. *Ibid.*

3. Unliquidated damages cannot be set off until they are re-

duced into a judgment. *Hogg v. Ashe*, 1 Hay., 471, (544.) S. C. Conf. Rep., 3 (145.)

4. Where the debt offered to be set off is recoverable and payable out of the same fund, that the debt recoverable in the action goes to increase, it may be set off. *Ibid.*

5. Where both of two partners are alive, and sue for a debt due the firm, a debt due from one of them to the defendant cannot be set off; but when one dies, the other, when he sues for partnership as survivor, sues *in jure proprio*, and the defendant may then set off a debt due from the living partner in his private right. *Ibid.*

6. When a chose in action is actually assigned for value, it shall not be liable in the hands of the assignee to a set off of a sum becoming due from the assignor subsequently to the assignment, if there be an act of the Legislature taking notice of the assignment, and enabling the assignee to sue in his own name. *Ibid.* (S. C. Conf. Rep., 3, (145.))

7. On a *sci. fa.* to show cause, the court allowed a judgment in the court of another district to be set off against its own judgment between the same parties, and an execution to issue for the balance. *Noble v. Howard*, 2 Hay., 14, (163.)

8. Where a party cannot sue in his own name on a note, having but an equitable interest therein, he cannot, except under special circumstances, avail himself of it by way of set off. *Wofford v. Greenlee*, Conf. Rep., 79, (212.)

9. A plea of set off is in the nature of a cross action, and the plaintiff may reply several matters thereto. *Holding v. Smith*, 1 Murph., 154, S. P., *Worth v. Fentress*, 1 Dev., 419.)

10. In practice, where no replication is actually entered, a general replication is understood. Therefore, when the defendant pleaded a set off and other pleas, and no replication to either was entered, and, after a verdict and new trial awarded, leave was given to the plaintiff to reply the statute of limitations to the set off; *it was held* that this was no waiver of the general replication before presumed, but that the plaintiff might on the second trial insist on both. *Worth v. Fentress*, 1 Dev., 419.

11. Debts which may be set off must be such as are due in the same right; therefore, where A gave his note to B, administrator of C, and B assigned the note to D who sued A, the latter was not permitted to set off a note given by B to E and by him assigned to A, nor a note given by B to A. *Roberts v. Jowes*, 1 Murph., 353.

12. In an action of covenant for uncertain damages, no set off or claim in the nature of a set off can be allowed. *Dowd v. Faucett*, 4 Dev., 92.

13. A debt due to one of several defendants by the plaintiff cannot be pleaded as a set off. *State Bank v. Armstrong*, 4 Dev., 519.

14. The balance of a general cash account, due by a bank to a depositor, is a *debt* which may be set off to any claim of the bank against the depositor, and is not *money* which the latter may apply at his election, to either of those claims. *Ibid.*

15. Where an administrator brought an action of assumpsit for goods sold and delivered by his intestate, the defendant pleaded a set off of goods sold and delivered by her to the intestate, the plaintiff replied that there were debts of superior dignity to which his assets were subject, and the defendant demurred to the replication, *it was held* that the demurrer must be sustained because the act of assembly, relating to sets off, has expressly declared, that mutual debts, subsisting at the death of a testator or intestate, between him and another party, shall be set off, notwithstanding the debts may be deemed of different natures. *Austin v. Holmes*, 1 Ired., 399. (See Rev. Code, ch. 31, sec. 77.)

16. In an action of covenant, in which it appeared that the defendant covenanted to deliver to the plaintiff a certain quantity of bacon by a certain time; the defendant cannot, as a defence to this action, either under the plea of a performance, or as a set off, or even in diminution of damages, offer in evidence a separate covenant of the plaintiff, dated the same day, to deliver to the defendant a certain quantity of corn, and, in addition, parol proof that the latter covenant was the consideration of the former, and that the latter covenant had been broken. *Lindsay v. King*, 1 Ired., 401.

17. A set off under our statute, must be of a *money demand*, and of a *liquidated nature*, and one on which an action of *debt* or *indebitatus assumpsit* would lie. *Ibid.*

18. Where a suit is brought by the administrator of one intestate against the administrator of another intestate for a debt, due from the intestate of one to the intestate of the other in their life-time, the defendant may set off a debt that was due from the plaintiff's intestate to his intestate. *Barnard v. Jordan*, 3 Ired., 268.

19. Where a suit is brought against an administrator for a debt due by his intestate, he cannot set off a debt due to himself for goods of his intestate, which he, as administrator, sold to the plaintiff's intestate. *Ibid.*

20. The rule is, if *both* parties *must* sue and be sued in their representative characters, then debts respectively due in those characters may be set against each other; but where *one* of the parties *must* sue or be sued in his representative character, and the *other may* sue or be sued without naming him executor, then the debts, as being due in different rights cannot be set against each other. *Ibid.*

21. A judgment in one court may be set off in an action of assumpsit in another court. *Wright v. Mooney*, 6 Ired., 22.

21. Courts of law in this State only recognize the *legal* claimant in a suit, and will not permit a set off to be introduced against one, who is alleged to have an equitable assignment of the claim. *Jones v. Gilreth*, 6 Ired., 338.

22. Where a suit is brought by A against B and C, a claim by B alone against A will not be allowed as a set off. *Ibid.*

23. The plaintiff commenced his action of assumpsit on the 3rd of July, 1846, and on the 13th of that month, when the court, to which the action was returnable, sat, the defendants pleaded as sets off certain bonds of the plaintiff due the 3rd of July. On these bonds the defendant had sued out warrants against the plaintiff on the 7th and recovered judgments on the 10th of July, of the same year; and *it was held* that these bonds could not be pleaded as sets off, because they were merged in the judgments before the plea pleaded; it being the rule that a set off must not only be due at the commencement of the suit, but must continue to be due in the same form when pleaded. *Mizell v. Moore*, 7 Ired., 255.

24. In an action by a surviving partner for a debt alleged to be due to the firm, the defendant cannot avail himself of a debt due to him by a deceased member of the firm, either as a set off or a payment, though the contract between the latter and the defendant was, that the debt, being for the board of this partner, should be paid out of the store, in which the plaintiff and the deceased were co-partners. *Norment v. Johnston*, 10 Ired., 89.

25. It is the settled law in this state, that a debt due by an assignor of a bond or note at the date of an assignment, may be pleaded as a set off to an action by an assignee after maturity; but this departure from the statute, is put on the ground, that a liberal construction is necessary to prevent evasion and injustice. But where it is shown that injustice will not result, the rule is different; as where the assignor, at the date of the assignment, had an account against the defendant in the action, larger in amount than that which is attempted to be set off. In such case, the defendant cannot avail himself of his account as a set off, in an action by an assignee, on a note or bond assigned after maturity. *Wharton v. Hopkins*, 11 Ired., 505.

26. Where an agent, by concealing his agency, renders himself personally liable on a contract made for his principal, he cannot avail himself of a debt due by the plaintiff to his principal as a set off. *Forney v. Shipp*, 4 Jones, 527.

27. If a plaintiff sue two partners for a firm debt, a debt which they have against him will be a good set off, even though the plaintiff enters a *nol. pros.* as to one of the defendants. *Sellers v. Streater*, 5 Jones, 261.

28. A held a note against C which he assigned after it was due, and the assignee sued C, *it was held* that C had a right

to set off a note, payable to himself by A and another person. *Hurdle v. Hanner*, 5 Jones, 360.

29. Where a father gave a promissory note to his son, and afterwards became bound as his surety for a debt which he was compelled to pay, *it was held* that the sum thus paid was a good set off against the note in the hands of an assignee who took it after it was due with a knowledge that the father had paid the surety debt; and that the following clause in the will of the father, "I give to my son, for the benefit of his child, the sum of \$500; this to his son and one dollar to himself, with the amount of money I shall have to pay him, I consider a fair and equitable portion of my estate," did not alter the case. *Harrington v Wilcox*; 8 Jones, 349.

See (Covenant, 9.)

SHERIFFS.

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| I. Of the election of sheriffs. | VI. Liability of sheriffs as bail. |
| II. Authority of sheriffs and remedy for them. | VII. Liability of sheriffs for escapes. |
| III. Duty of sheriffs in relation to process issued to them, its execution and return. | VIII. When the defendant in the process is sheriff, and of successive sheriffs |
| IV. Of the liability of sheriffs and their sureties. | IX. Sales by sheriffs. |
| V. Liability of sheriffs for their deputies. | X. Amendment of sheriffs' returns. |
| | XI. Compensation to sheriffs. |

I. OF THE ELECTION OF SHERIFFS.

1. The county court, a majority of the acting justices being present, is the tribunal to decide all contested elections for sheriffs; and the validity of the election, or any alleged irregularities can only be objected to in a direct proceeding before that tribunal. *State v. Cahoon*, 12 Ired., 178.

See (Costs—When neither party recovers costs, 9.) (Mandamus and Quo Warranto, 2-4.) (Sheriff—Of the liability of sheriffs and their sureties, 25-26.)

II. AUTHORITY OF SHERIFFS, AND REMEDY FOR THEM.

1. A sheriff may recover on a written promise of indemnity, when he abstains from selling property, believing that he has no right to sell it. *Joyce v. Williams*, Tay., 27, (20.) (*Quære*, and see *Denson v. Sledge*, 2 Dev., 136.)

2. A sheriff may proceed on a Sunday to enforce by distress the penalty, authorized by a revenue act of the legislature, for peddling without a license. *Cowles v. Brittain*, 2 Hawks, 204.

3. An officer cannot break open an outer door or window to execute civil process, and if the door be partly closed by those within, who are resisting the entrance of the officer, and be not entirely shut, the officer is guilty of trespass, should he oppose them with force, and thereby gain an entrance. *State v. Armfield*, 2 Hawks, 246.

4. A deputation expires of necessity with the office on which it depends; therefore where a sheriff appointed a deputy who gave bond for his faithful conduct "during the continuance of his appointment," and the sheriff was afterwards re-elected, and the deputy continued to act under him for several years without any new appointment, *it was held* that the words "during," &c., should be restricted to the first year for the deputation then expired. *Banner v. McMurray*, 1 Dev., 218.

5. In an action by a sheriff for property levied on by him, his endorsement on the execution is sufficient to show the levy, though its truth may be impeached by evidence on the other side. *Loftin v. Huggins*, 2 Dev., 10.

6. A promise made to a sheriff to indemnify him for doing an unlawful act, or for omitting to perform his official duty, is void. The rule, however, is subject to the exception that the act be not one which is apparently lawful in furtherance of the sheriff's duty. Hence, a promise to indemnify a sheriff for neglecting to levy a *fi. fa.*, or for postponing its execution, is bad; but an indemnity to him for levying an execution against A on goods in the possession of B is valid. *Denson v. Sledge*, 2 Dev. 136.

7. Where the sheriff was a surety to the principal defendant and a party to the writ, which for that cause was issued improvidently to him, *it was held* that notwithstanding this, the promise of a stranger to pay the debt on the return day of the writ, if the sheriff would not proceed under it, was void. *Ibid.*

8. The act of 1777, and the statute of 23rd Hen. 6, ch. 10, apply only to bonds given by persons in the ward of the sheriff; not to bonds given upon writs of *fi. fa.*, and the latter are good, unless given upon a consideration bad at common law. *Ibid.* (See Rev. Code, ch. 105, sec. 19.)

9. The act of 1807 authorizing sheriffs to take forthcoming bonds, does not interfere with the rules of the common law, touching the duty of a sheriff; it is merely permissive, and no agreement can be enforced under it, which is not strictly in pursuance of it. *Ibid.* (See Rev. Code, ch. 45, sec. 21.)

10. When a sheriff executes a writ, and permits the defendant to go at large under a promise to give bail to a deputy, the latter is not liable to the sheriff for the escape of the defendant. *Dowell v. Vannay*, 3 Dev., 23.

11. The sheriff is protected by a writ of *fi. fa.*, and is not bound to show any judgment. It is sufficient for his defence that he has acted in obedience to a mandate proceeding from a court of competent authority; and if he have a writ of execution bearing *teste* the first day of a term, he may by virtue thereof, take away goods of the defendant in the hands of a person, who had *bona fide* purchased them since the *teste* of the writ. *Farley v. Lea*, 4 Dev. and Bat., 169.

12. When a sheriff levies upon goods, and leaves them with the debtor, the possession of the debtor may, to many purposes, be that of the sheriff, but it cannot be so in the sense of being adverse to the debtor himself, and of turning any right he had in the goods into a chose in action. *Popelston v. Skinner*, 4 Dev. and Bat., 156.

13. The right of a defendant in an execution to goods seized and taken possession of by the sheriff, is not absolutely divested by such seizure and possession, but an interest is left in the debtor, which he may sell and legally convey to another person. *Ibid.*

14. The general proposition that the property in goods taken in execution is in the sheriff, must be understood with qualification. The law gives him the property to enable him to raise the money he is commanded to make; and the property is given as far as it is necessary for that purpose, but no farther. As far as it is vested in the sheriff, it is divested out of the defendant, but of course no further. This interest in the sheriff, which is called a special property enables him to perform certain acts in regard to it; but it results from the very term "special property," that subject to the raising of the debt, the general property is in the former owner. *Ibid.*

15. Where a sheriff arrested a man on a *ca. sa.* and committed him to jail in the custody of the jailor, and the prisoner escaped; it was held that without a bond of indemnity, the jailor was only bound to the sheriff for want of fidelity or due care in the discharge of his duty. *Turrentine v. Faucett*, 11 Ired., 652.

16. A sheriff has a right to take a bond from the jailor to indemnify him for *all losses*, to which he may be subjected by the escape of a prisoner, while in custody of the jailor. *Ibid.*

17. Although a sheriff may have trover or trespass for goods seized in execution and taken from him by another, his deputy cannot. The law vests the property in the sheriff, because he becomes liable for the goods and the debtor is discharged; but the law does not charge the deputy with any duty to the creditor, and if he make default in serving an execution, he cannot be sued for it, but the principal is liable. In such a case the deputy is not a bailee as to the possession, but is merely a servant of his superior, and holds for him, and, therefore, has no action himself. *Hampton v. Brown*, 13 Ired., 18.

18. Where a sheriff takes a bond from his deputy for his in-

demnity "during his continuance in office," the bond only extends to the term of the principal sheriff's office then current, and cannot be held to embrace defaults occurring during the succeeding term. *Thomas v. Summey*, 1 Jones, 554.

19. A sheriff has the right, and when necessary it his duty, to summon the *posse comitatus* to aid him in the execution of final process. *Sutton v. Allison*, 2 Jones, 339.

III. DUTY OF SHERIFFS IN RELATION TO PROCESS ISSUED TO THEM, ITS EXECUTION AND RETURN.

1. All returns of process should be made in the name of the sheriff, and not in the name of the deputy sheriff for the high sheriff, though a return in the latter mode was supported. *McMurphey v. Campbell*, 1 Hay., 181, (208.)

2. A return by a deputy sheriff should be in the name of his principal, and if it be false, the latter is liable *criminaliter*. *State v. Johnston*, 1 Hay., 293, (338.)

3. A sheriff who sells under an execution, is not liable to the purchaser, if the title of the thing sold is not good. *Bright v. White*, 1 Hay., 492, (566.) (See Rev. Code, ch. 45, sec. 27, which makes the defendant in the execution liable in such case.)

4. Where a sheriff, upon an injunction being served on him, released goods he had previously levied on, the plaintiff shall not have an action against him, though no security had been given for the injunction. *Tagert v. Hill*, 2 Hay., 81, (249.) *S. C. Tay.*, 95, (59,) and 277, (117.) *Conf. Rep.*, 164, (283.)

5. A sheriff may confine in the prison of his own county a person arrested on a *ca. sa.* but he cannot imprison him in the county whence the writ issued. *Rutherford v. Allen*, 1 Car. L. R., 457, (69.)

6. Nor can the sheriff of the county whence the writ issued, imprison the person surrendered on the return of a *ca. sa.* unless a *committitur* be entered of record. *Ibid.*

7. A sheriff surrendering a person whom he has taken under a *ca. sa.*, to the court whence the writ issued, and having the surrender entered of record, need not give notice of it to the plaintiff in the judgment. *Ibid.*

8. A return upon a subpoena in the name of a person who subscribes D. S., (deputy sheriff,) is insufficient; as it should be in the name of his principal. *Holding v. Holding*, 2 Car. L. R., 440, (324.)

9. The court cannot judicially know a person deputed to act for a sheriff, as the authority of the deputy rests upon the private delegation of his principal. Besides, the return of a sheriff is upon oath, and therefore concludes a party in many cases, but the return of a person styling himself deputy sheriff, has no greater verity than that of any private individual. *Ibid.*

10. That the sheriff was kept off by force of arms, is a good return upon *mesne* process. On *mesne* process the sheriff may, but is not obliged to raise the *posse comitatus*. *Crumpler v. Glisson*, N. C. Term, R., 79, (516.)

11. Where a prisoner, desirous of being admitted to the prison bounds, applies to the sheriff and offers to prepare a bond with ample security, and the sheriff refuses to admit him to the rules or to take any bond, such conduct on the part of the sheriff is a waiver of any further act to be done by the prisoner, even supposing the law required him to prepare and tender a bond, but *it seems* it was the duty of the sheriff to prepare the bond. *Mann v. Vick*, 1 Hawks, 427.

12. A sheriff must execute all process which comes to his hands, with the utmost expedition, or as soon as the nature of the case will admit; and if he take no steps to do so in twenty-four days, and assign no good reason for the delay, he is liable. *Lindsay v. Armfield*, 3 Hawks, 548.

13. A sheriff is liable for the *mere* non-return of an execution, but the damages therefor will be only nominal. *McRae v. Evans*, 1 Dev. and Bat., 243.

14. A return by a sheriff on a *fi. fa.* that "he has levied on goods subject to older executions" without saying whether he has sold the property seized or still had it in his hands, or, if the latter, why he had not sold, whether for want of builders, or of time, or other sufficient excuse, is not a due return, because it does not answer the writ. *Buckley v. Hampton*, 1 Ired., 322.

15. The sheriff who makes such a return, as mentioned in the last section, is, therefore, liable to the fine of \$100 imposed by the act of 1777 for not making due return of process placed in his hands. *Ibid.* (See Rev. Code, ch. 105, sec. 17.)

16. A return of a sheriff to a *fi. fa.*, that "he had made a levy on personal property, and taken a forthcoming bond, but had not sold it; that the obligors did not deliver the property on the day, and that after the day, it was too late to make a sale" is not such a "due return" of the process as will exempt the sheriff from amercement. *Frost v. Rowland*, 5 Ired., 385.

17. The act allowing the sheriff to take a forthcoming bond operates only between the debtor and his sureties; the creditor being left to all his rights and remedies against both the debtor and the sheriff. *Ibid.*

18. The return by a sheriff of "not found," upon a *ca. sa.* is sufficient. *Wheeler v. Bouchelle*, 5 Ired., 594.

19. Where a writ from a court of competent jurisdiction is delivered to the sheriff, he is bound to execute it according to its exigency, without enquiring into the regularity of the proceedings on which the writ is grounded. *Cady v. Quinn*, 6 Ired., 191.

20. A sheriff is bound to mark on process delivered to him the *true* day on which it came to his hands; otherwise he will forfeit

the penalty of \$100 under the act. *Hathaway v. Freeman* 7 Ired. 109. (See Rev. Code, ch. 31, sec. 39.)

21. A sheriff, to whom a writ has been delivered, but who goes out of office before the return day of the writ, has no power to make the return on it, and therefore is not liable to an amercement for not doing so. *State v. Woodside*, 7 Ired., 296.

22. It is the duty of the sheriff going out of office to deliver all the process remaining in his hands, to his successor. *Ibid.*

23. When a sheriff returns that a writ came to his hands "too late to execute in time," the writ having been delivered to him more than ten but less than twenty days before the term of the court to which it was returnable, he is liable to the penalty of \$500 prescribed by the statute, for making a false return. *Lemit v. Freeman*, 7 Ired., 317. See Rev. Code, ch. 105, sec. 17.)

24. When a defendant in a writ is openly and at large in a county, *non est inventus* is a false return; and if he cannot be taken elsewhere, the statute requires that the sheriff shall go to his place of residence before he makes that return. *Hooser v. Hampton*, 7 Ired., 333. (The statute seems to be omitted in the Rev. Stat. and the Rev. Code.)

25. If a sheriff, who has *mesne* process in his hands, finds the defendant and actually endeavors to arrest him, and is prevented by any sufficient cause, or if, after arrest, the defendant is rescued, he should make a return of the facts in excuse for not taking the body, and not return generally, "*non est inventus*," contrary to the fact. *Ibid.*

26. Rescue, is a good return in excuse, and the sheriff may return that he did not take the body because he was kept off by force of arms. *Ibid.*

27. What is an excuse to the sheriff for not making an arrest is a matter of law, after the facts are ascertained. *Ibid.*

28. The sheriff is not obliged to summon the power of the county in assisting to make an arrest upon *mesne* process. *Ibid.*

27. A sheriff has no right to return *nulla bona* on an execution, without making an effort to find property at the residence of the defendant in the execution, or making any demand for payment, or enquiry for property. And, a mere general report that the debtor has no property, will not justify such a return, if the debtor in fact has property subject to be levied on. *Parks v. Alexander*, 7 Ired., 412.

30. The law requires that a writ of execution shall be returned to the court and not to the clerk. It is true the clerk is the officer of the court to receive the writ, and whatever may be raised upon it; and his office is the place where the records of the court are kept and preserved. But if the clerk will not receive the return when tendered to him, the sheriff, to discharge his duty, must return the precept and the money, if he have made it, to the court; which will, upon a proper representation, make

such order as the case may require, and in a proper case, direct the clerk to receive the process. *Hamlin v. March*, 9 Ired., 35.

31. The death of the clerk during term time, is no excuse for the sheriff not making a return. *Ibid.*

32. An officer who has an execution is bound to levy it on the property he finds in the defendant's possession, unless he knows, or has reason to believe, that it does not belong to him, or is by law exempted from execution. *Henson v. Edwards*, 10 Ired., 43.

33. An officer having an execution, levied on a gun belonging to the defendant, and sold it; and *it was held* that, not knowing, or having good reason to believe, that it was used by the defendant for mustering, and therefore exempt from execution, he was not liable to him for taking and selling the gun. It was the duty of the defendant in the execution to have informed the officer before the sale, that the gun was kept for the purpose of mustering. *Ibid.*

34. Where a *sci. fa.* has been sued out upon a judgment, and while it was in the sheriff's hands, the parties agreed that the collection of the money should be suspended, so as to enable them to make a full settlement, yet the sheriff is not thereby excused from returning the process, but is liable to an amercement if he fail to do so. *Morrow v. Allison*, 11 Ired., 217.

35. A sheriff is not bound to collect an execution, and pay the amount to the plaintiff before the return day of the writ. *State v. Mann*, 13 Ired., 444.

36. Where a sheriff returned an execution "enjoined," *it was held* that the return was sufficient. *Patton v. Marr, Busb.*, 377.

37. A sheriff, by his return that he has levied upon the personal property of the defendant, is estopped to deny the truth of it. *Sutton v. Allison*, 2 Jones, 339.

38. It is the duty of the sheriff to return a writ of *capias ad respondendum* on the first day of the term to which it is returnable; and if it be not returned before Thursday of the term, he may be fined for not making a due return of the process, and the amercement may be moved for and entered against him at a subsequent term. *Hyatte v. Allison*, 3 Jones, 533. (See Rev. Code, ch. 31, sec. 50, and ch. 105, sec. 17.)

39. Where a *fi. fa.* issues together with a *vend. expo.* to sell property levied on under a *fi. fa.* it is a sufficient return to state on the *fi. fa.* "no property to be found except what has been heretofore levied on and sent to your office;" and on the *vend. expo.* "no sale for want of biddeas." *McDowell v. Robison*, 3 Jones, 535.

40. A "due return" of process means a proper return, made in proper time. What is a proper return in form and substance is a question of law to be decided by the court; but whether it was made in proper time is a question of fact to be decided by the jury. *Waug v. Brittain*, 4 Jones, 470.

41. Where a sheriff, having a writ of *capias ad respondendum* against a resident of another state who was on a temporary visit to his county, was informed that the person would be at a particular place near the county line on a certain day on his way out of the state, and failed to be there on the day without being able to show any good cause for his neglect, and thereby missed the opportunity of arresting the defendant; *it was held* that he was guilty of such negligence as made him responsible in damages to the plaintiff. *Murphy v. Troutman*, 5 Jones, 379, S. C. and S. P. 7 Jones, 169.

42. Where a sheriff is guilty of neglect in not executing a writ of *capias ad respondendum*, the *onus* of showing that the defendant therein was insolvent, and that nothing could have been made out of him, is thrown upon the sheriff. And if, in such a case, it appear that the defendant had property in a distant state, and had many friends and relations in the county in which the writ issued, it will be error in the court to instruct the jury that the plaintiff can recover nominal damages only. *Ibid.* S. C. and S. P., 7 Jones, 169.

43. Where a sheriff mailed an execution in time, by the ordinary course of the mail, to have reached the clerk to whom it was directed, before the setting of the court to which it was returnable; *it was held* to have been a return in due time. *Cock-erham v. Baker*, 7 Jones, 288.

44. A sheriff cannot be amerced for not making a "due return, if he return an execution satisfied," within proper time, though he fail to return the money levied thereon into court, or pay it to the party or his attorney. *Ibid.*

45. Where a sheriff endorsed truly the day on which he received a declaration in ejectment returnable to a county court, and returned on the same "too late to hand," although five days intervened between the day endorsed and the return day; *it was held* that he was not liable, under the act, Rev. Code, ch. 105, sec. 17, to the penalty for making a false return. *Hassell v. Latham*, 7 Jones, 465.

46. The sheriff's return on process "not to be found in my county," implies that the person on whom it was to be served, was not to be found after due search, and if the fact thus implied, be untruly stated, the return is false. Therefore, where a witness was at his home in the sheriff's county, for fifteen days preceding the return day of the process, *it was held* that the sheriff was liable to the penalty for making a false return in saying that he was not to be found, although he lived twenty-five miles from the witness, and was informed that he would continue out of the county during all that time. *Tomlinson v. Long*, 8 Jones, 469.

47. A sheriff's return which is false in fact, will subject him to a penalty for a false return, although the officer was laboring

under a mistake as to the matter of the return. *Albright v. Tapscott*, 8 Jones, 473.

See (Abatement—By the death of parties, 12.) (Execution—Levy, sale and application of the money raised.) (Record, 18.)

IV. OF THE LIABILITY OF SHERIFFS AND THEIR SURETIES.

1. In a suit on a sheriff's bond, the court permitted judgment to be entered up for the amount of the default, without regard to the penalty. *Hostler v. Patterson*, 1 Hay., 216, (246.) (The judgment should be for the penalty to be discharged by the payment of the damages assessed.)

2. A verdict of a jury, summoned by a sheriff to satisfy himself, whether or not goods belong a defendant against whom he has an execution, cannot bind the rights of the litigating parties; but will excuse him for returning *nulla bona*, and will mitigate the damages in an action of trespass, should the goods taken not belong to the defendant. *Pearson v. Fisher*, 1 Car. L. R., 460, (72.)

3. It seems that the plaintiff in an execution may sustain an action against a sheriff, who refuses to sell property that a jury has found not to belong to the defendant, if, in fact, it was his; and certainly such action may be sustained, if the plaintiff offer the sheriff an indemnity. *Ibid.*

4. The return on a *fi. fa.* of "not satisfied" is not a due return under the act of 1777, and the sheriff making such return is liable to be amerced. *Douglass v. Auld*, 1 Car. L. R. 500, (112.) (See Rev. Code, ch. 105, sec. 17.)

5. A sheriff cannot be amerced who returns an execution within the time prescribed by law, though he fail to return the money levied thereon into court, or to pay it to the party or his attorney. *Davis v. Lancasters*, 1 Murph., 255.

6. The summary remedy against a delinquent sheriff, given by the act of 1808, (now obsolete) held to apply as well to cases where the delinquent was out of office, as where he was not; and also applies to arrearages due by delinquents before the passage of the act; held, also, that the act was a beneficial one and was to be liberally construed. *Oats v. Darden*, 1 Murph., 500.

7. Where money has been paid into the hands of a sheriff by a person under the belief that the sheriff had an execution against him, when he had none, but afterwards an execution against the same person did come to his hands, which he returned "satisfied" to the amount which he had before received of such person, held that the sureties were bound by the return. *State Bank v. Twitty*, 2 Hawks., 5.

8. If a person, upon being elected sheriff, voluntarily gives bond and security in a penalty greater than that required by law, and enters upon the duties of his office and make a breach

of the condition, he will be liable to the full amount of the penalty in a suit upon the bond; but a judgment cannot, *on motion*, be rendered against the sureties to such bond, under the act giving a summary remedy against the sheriff. *Ibid.* S. P. *Governor v. Matlock*, 2 Hawks, 366.

9. When a sheriff gives a bond payable to the Governor, in a suit on such bond it is not necessary to show that the Governor has sustained damage, for the bond is taken substantially to the people themselves for their benefit. *Governor v. Matlock*, 2 Hawks, 366, (Sheriff's bonds are now taken payable to the State. See Rev. Code, ch. 105, sec. 13.)

10. A sheriff is not liable for levying on lands when the defendant in the execution had personal property sufficient to pay the debt, unless it can be shown that he knew it to be the property of the defendant, or unless it be pointed out to him as such, and an indemnity offered to sell it. *McCoy v. Beard* 2 Hawks, 377.

11. The sureties to a sheriff's bond for the year 1821 are not liable for any taxes, received by their principal under the tax lists furnished him in 1820; but the sureties of 1820 are liable. *Fitts v. Hawkins*, 2 Hawks, 394.

12. A sheriff's bond, not drawn pursuant to the act, is yet good as a voluntary bond; and in a suit on such bond, a suggestion of damages should be made; but if not made, it is not a good ground of objection after verdict. *Governor v. Witherspoon* 3 Hawks, 42.

13. When the condition of a sheriff's bond was in these words: "that he shall well and truly account for, and pay into the hands of the county trustee for the time being, all such sum or sums of money, as may be or shall come into his hands, or which he ought to collect for the use of the county, and in all things comply with the acts of assembly in such case made and provided," *it was held* that, when the sheriff had received a part of the tax laid for the repair of the public buildings, the condition of his bond was broken upon the non-payment of it to the treasurer of public buildings, to whom by law he is directed to pay it. *Cameron v. Campbell*, 3 Hawks, 285.

14. When a sheriff levies on realty before personalty, the defendant in the execution may have cause of complaint, but not the plaintiff, provided he gets the benefit of his judgment; nor can he, for such cause, charge the sheriff with a breach of official duty. *Governor v. Carter*, 3 Hawks, 328.

15. When a sheriff levies on goods sufficient at the time to satisfy an execution, but which, before the day of sale, depreciate in value, he is not bound to make good the depreciation. *Ibid.*

16. A sheriff or other officer cannot be charged with a breach of duty, for considering and treating the current bank notes of

the country as money, unless notified by those concerned not to do so. *Ibid.*

17. Where judgment is entered up summarily against the sureties of a sheriff, it will be set aside if good cause therefor be shown. *Crumpler v. Governor*, 1 Dev., 52.

18. In a bond given for a specific object, especially in a bond required by statute from a public officer, general words shall be construed only in reference to that object. Therefore, when a bond is given with a condition that the sheriff "shall collect the county contingent tax, and in all things perform his duty as sheriff," the public taxes cannot be recovered on it. *Ibid.*

19. The county tax cannot be recovered of the sheriff and his sureties upon the general official bond required of him by the act of 1777. *Governor v. Barr*, 1 Dev., 65. (See Rev. Code, ch. 105, sec. 13.)

20. The return of a sheriff that a *fi. fa.* is satisfied is conclusive evidence against his sureties on his official bond. *Governor v. Twitty*, 1 Dev., 153.

21. A sheriff's bond payable to the governor and his successors in office, in a sum different from that directed by law, cannot be sued upon in the name of the successor. *Ibid.*

22. A sale under a *vend. expo.* is an act done in execution of the authority given by the writ under which the levy was made. Therefore, where a sale was made by one, who was a sheriff under two successive elections, during his second term under a levy made during his first, *it was held* that a failure to pay over the money was no breach of his second official bond. *Governor v. Eastwood*, 1 Dev., 157.

23. Where the condition of a sheriff's bond has appropriate words to secure the performance of a certain class of duties imposed on him by law, general terms superadded thereto (though large enough to include all his official duties,) shall not extend the liability of the surety to other duties, for which, by law, a separate bond is directed but omitted to be given. *Governor v. Matlock*, 1 Dev., 214.

24. For a mere nonfeasance by a deputy sheriff, without any wrongful act of commission, the principal, and not the deputy sheriff must be sued. *Mitchell v. Durham*, 2 Dev., 538.

25. Before the act of 1829, sheriffs, though elected for one year, by the act of 1777, held their office until the qualification of their successors. *Collins v. Nall*, 3 Dev., 457. (For election of sheriff, and the duration of his office. See Rev. Code, ch. 105, secs. 1, 2, 8.)

26. Although sheriffs, before the act of 1829, were elected at stated terms of the county court, they held their offices, not from the court at which they were elected to the next court at which an election was to be made, but for one year. *Ibid.*

27. If a sheriff forbear, at the request of the plaintiff, to collect

money on an execution, he is not responsible therefor; but if he forbear, of his own accord, he will be liable for the actual damages the plaintiff may sustain, which will be the whole debt, if that were lost, or only damages for the delay, if it can still be collected. *McRae v. Evans*, 1 Dev. and Bat., 243.

28. When a sheriff returns an execution "*feri feci*" and retains the money, he is immediately liable to the plaintiff's action, as for money had and received, or for a breach of his official bond. *White v. Miller*, 3 Dev. and Bat., 55.

29. A bond given by a sheriff, with a condition to return process, and pay over monies, &c., "and in all things well and truly to execute the said office," is not broken by a neglect to collect and pay the parish taxes. *Jones v. Montfort*, 3 Dev. and Bat., 73.

30. A breach assigned "for a general misteasance in office," in a suit on a sheriff's bond, is too general and broad, and the court will not permit any evidence to be given upon it. *Governor v. Harrison*, 4 Dev. and Bat., 468.

31. The sureties to a sheriff's bond, with a condition in the ordinary form, are liable under the act of 1829 for an amercement of the sheriff for a default committed during his official year, though the final judgment for the amercement may not have been rendered until after the expiration of the year. *Governor v. Montfort*, 1 Ired., 155. (See Rev. Code, ch. 105, sec. 14.)

32. A creditor, who has an execution in the hands of a sheriff, has a right to recover from him such a proportion of the value of the property which ought to have been sold, as would, if there had been a sale according to the duty of the sheriff, have been applicable to his execution. *Buckley v. Hampton*, 1 Ired., 318.

33. It is not only the duty of the sheriff, when he receives a *fi. fa.*, to seize property, if he can find it; but it is also his duty to sell the property seized before the return of the writ, unless he have some lawful excuse for not doing so; such as the want of time or bidders, or the indulgence of the creditors. And for a failure in this respect, he is liable to an action on his official bond, in which there must be a recovery of, at least, nominal damages. *Ibid.*

34. The owner of property may maintain against a sheriff any action for detaining or converting his property, taken under an execution against a third person, which he could have, if the taking were without process, because he is a stranger to the process. *Burquin v. Burquin*, 1 Ired., 453.

35. A sheriff, to whom a writ has been delivered, but who goes out of office before the return day of the writ, has no power to make a return on it, and, therefore, is not liable to an amercement for not doing so. *McLin v. Hardie*, 3 Ired., 407.

36. The settlement by a sheriff of his public accounts with the committee of finance of his county, with whom he is bound

by law to settle, is an act performed in the regular course of official duty, and is, at least *prima facie*, binding on him and his sureties. *State v. McAlpin*, 4 Ired., 140.

37. Evidence in a suit against a sheriff and his sureties, that he owed a particular amount in February, is evidence that he owed the same amount in the succeeding August, unless the contrary be proved. *Ibid.*

38. The county court, and not the sheriff or county trustee, is to judge of the propriety of an order for the payment of money out of the county funds, and therefore the latter must pay it, if he have the funds, and, if he refuse, the person in whose favor the order is drawn is entitled to an action on the official bond of such sheriff or county trustee. *Ibid.*

39. If a sheriff be the trustee of a mortgagor against whom an execution issues, and the sheriff sell the equity of redemption under the execution, he and his sureties will be liable for the surplus to the mortgagor or his representatives after the satisfaction of the execution. *State v. Pool*, 5 Ired., 105.

40. Under our statutes, a second action may be brought on a sheriff's bond, for money which he holds as county trustee, by any person who is injured thereby, and so *toties quoties*, until the penalty is exhausted. But the injured party may, if he prefer it, recover what is due to him by a *sci. fa.* on the first judgment, setting forth breaches. *State v. McAlpin*, 6 Ired., 347.

41. Where, in an action against a sheriff and his sureties for failing to collect the county taxes, it appeared from the record that "twenty-two justices" were on the bench when the taxes were assessed, *it was held* that the court must intend that these were a majority, or the whole of the justices of the county, and that, therefore, the taxes were properly imposed; and that this was different from the cases, in which the law requires a *certain number* of justices to be present, when a tax is imposed, and the record does not show that the requisite number was present. *State v. McIntoch*, 7 Ired., 68.

42. A sheriff and his sureties on his official bond are not bound for the collection of any claim put in his hands for collection, unless, as in the case of constables, the claim be within the jurisdiction of a justice. *State v. Long*, 7 Ired., 379.

43. Under the acts relating to the county of Brunswick, the justices of the county court who may attend, may lay taxes, and take the sheriff's bond and do all other things required by the general law to be done by a majority of the justices of the county, provided the majority do not attend; and the sheriff of the said county and his sureties will be liable on his bond so taken. *State v. Woodside*, 8 Ired., 104.

44. Although the clerk may not deliver to the sheriff an official copy of the list of taxables, yet if he proceed without such official list to collect the taxes, he and his sureties on his bond

are bound for the amount he may so collect; notwithstanding he could not have enforced the collection without such certificate from the clerk. *Ibid.*

45. A sheriff may, for not returning process, be amerced at a term subsequent to that at which the return should have been made. *Halcombe v. Rowland*, 8 Ired., 240.

46. To render a sheriff liable for making a false return it must appear that the return is false in point of fact, and not false merely as importing, from facts truly stated, a wrong legal conclusion. *Lemit v. Mooring*, 8 Ired., 312.

47. Where, upon an action against a sheriff and his sureties on his official bond, it appeared that the relator was a defendant in a writ, directed to the sheriff and placed in his hands, upon which, instead of a bail bond, he took a deposit of money, *it was held* that the sureties of the sheriff were not liable, although the defendant in the writ offered to surrender himself and demanded the money of the sheriff. *State v. Long*, 8 Ired., 415.

48. A defendant, upon a writ of *capias ad respondendum* being served upon him, placed in the hands of the sheriff, who served it, the amount of the debt for which he was sued, but the sheriff neglected to apply it for that purpose, whereupon the defendant was compelled to pay it out of other funds; and *it was held* that the sureties of the sheriff were not liable to the defendant for such neglect. *State v. Long*, 8 Ired., 513.

49. Notwithstanding the private act of 1835, relative to the county trustee and sheriff of Moore county, an action in the name of the State to the use of the county will lie against the sheriff on his official bond for not collecting and accounting for the county taxes. *State v. McIntosh*, 9 Ired., 307.

50. It is the duty of a sheriff to apply to the clerk of the county court in proper time for a certified copy of the tax list, and if he do not, neither he nor his sureties can avail themselves of the neglect of the clerk to furnish such list. *Ibid.*

51. Although a sheriff be a defaulter when he is reappointed, yet his reappointment is not thereby made void. *Ibid.*

52. A demand is not necessary, before action brought, for money collected by a sheriff for public purposes. *Ibid.*

53. Although a tax list made out by a clerk and delivered to the sheriff may be defective, yet the sheriff who receives it and acts under it cannot make the objection. *State v. Woodside*, 9 Ired., 496.

54. Where a public officer collects money due to a county, no demand is necessary before suit is brought. *Ibid.*

55. The county trustee, where there is one, is the proper relator in an action to recover, from the sheriff and his sureties, money due to the county, except when the county trustee is a defaulter, or when he refuses to proceed against defaulters; and in these

cases suits may be brought by the committee of finance in the name of the State. *Ibid.*

56. It is no answer for a sheriff, when sued for negligence in not executing process against a debtor, to say that the debtor, even after being imprisoned under a *ca. sa.*, might pay, or secure to be paid by assignment, other *bona fide* debts, to the disappointment of the judgment creditor. The true enquiry is, has the sheriff, by his negligence, deprived the plaintiff of any legal means of securing the payment of his debts? If he have, and the debtor had property, which might by due process have been subject to it, the sheriff and his sureties shall be liable to the amount of the debt, which might have been thus secured. *Sherrill v. Shuford*, 10 Ired., 200.

57. The sureties on the official bond of the sheriff are not liable for a trespass committed by him under color of his office. *State v. Brown*, 11 Ired., 141.

58. When an execution against two does not distinguish which is principal and which surety, the sheriff has a right to collect it from either; and the one from whom it is collected has no cause of action against the sheriff, though he claimed to be a surety only, and though the plaintiff in the execution directed the sheriff to collect it from the other. *Shuford v. Cline*, 13 Ired., 463.

59. If a sheriff levy an execution upon land, where there is sufficient personal property to satisfy the debt, any injury inflicted is a matter between the sheriff and the owner of the property, the defendant in the execution. *Simpson v. Hiatt*, 13 Ired., 470.

60. The school tax levied by the county courts under the act of 1844, ch. 30, sec. 6, is a "county tax." Therefore, where the condition of a sheriff's bond provided for his "collecting all county taxes," and paying them over "to the persons authorized to receive the same;" *it was held* that, notwithstanding the condition did not contain any provision respecting the collection and payment of the school tax, as expressly directed by the said act, the sheriff and his sureties were liable for the failure to collect and pay over that tax. *Lindsay v. Dozier*, Busb., 275. (See Rev. Code, ch. 66, sec. 32.)

61. A sheriff to whom a runaway slave has been delivered, but not under or by virtue of a warrant from a justice, is not liable for the escape of such runaway from the jail of the county, under the act, Rev. Stat., ch. 111, secs. 11, 12 and 13. *Brock v. King*, 2 Jones, 302. (See Rev. Code, ch. 107, secs. 9 and 17.)

62. A defendant in an execution paid the money to the sheriff who had the writ in his hands, but the sheriff failed to make a return of the money or the process, whereupon a second execution was issued, and the defendant paid the money again; and *it was held* that he could not sustain an action upon the official

bond of the sheriff, for failing to make the proper return; for that was the remedy for the plaintiff in the execution; and the defendant's remedy was to have had the second execution set aside on motion, or to have sued the plaintiff in the execution for money had and received, as having been paid by mistake under a void process. *Brooks v. Gibbs*, 2 Jones, 326.

63. A sheriff is liable on his official bond for the non-payment of a judgment obtained against him on a *sci. fa.* to subject him as special bail, for not having taken a bail bond from the defendant in a writ executed by him. *Evans v. Blalock*, 2 Jones, 377.

64. Where a sheriff received into his custody a runaway slave, without a warrant of commitment, and without chaining him locked him in the dungeon of the common jail of his county from which no person had ever escaped before, though the jail generally was very insecure, and the runaway escaped by breaking the door and making a hole in the wall, *it was held* that though the sheriff intended to charge a fee for keeping the runaway, and was liable for not using ordinary care, yet in this action, which was one at common law, he was not guilty of a want of due care, and therefore was not responsible for the escape of the slave. *Brock v. King*, 3 Jones, 45.

65. Ordinary care, in such a case, is a question of law to be decided by the court; but though it be erroneously left to the jury, if they decide it correctly, there is no ground for a *venire de novo*. *Ibid.*

66. When a sheriff returned upon a *fi. fa.* two credits for money received thereon at different times, and suppressing a third credit, returned the execution "not satisfied," *it was held* that the return was false, and subjected the sheriff to the penalty of \$500 given by the Rev. Code, ch. 105, sec. 17. *Martin v. Martin*, 5 Jones, 346.

67. The penalty of \$500, given by the act above referred to, may be sued for in the name alone of the person bringing the action, and he need not allege that any other person is to have part of the recovery, as that is shown by the act of assembly. *Ibid.*

68. The penalty, given by the act for making a false return to process, applies to process in civil cases, and not to that in criminal proceedings. *Martin v. Martin*, 5 Jones, 349.

69. Though a defendant in a *capias* may be out of the State when the return on the process is made, yet the return of "not to be found" will be false if the sheriff had had an opportunity, previously, of executing it while it was in his hands. *Ibid.*

70. Taxes ordered to be collected to build or repair court houses, jails, &c., under the Rev. Code, ch. 30, sec. 1, are demandable and receivable from the the sheriff by the treasurer of public buildings, and not by the county trustee. *McKenzie v. Buchanan*, 6 Jones, 31.

71. The treasurer of public buildings cannot proceed in a summary manner against a sheriff for failing to pay him taxes levied for the building or repairing the court house, &c., but he must do so by action at law in the regular manner. *Ibid.*

72. Proof that a writ was directed by the clerk of a court to the sheriff of another county, and mailed in due time to have reached him in the regular course of the mail, *was held* to be sufficient evidence to authorize the entry of a judgment *nisi* against him, if there has been no return of the process. *State v. Latham*, 6 Jones, 233.

73. Where a sheriff received money from a defendant in a judgment, such sheriff having at the time no process in his hands commanding him to levy it, *it was held* that the sureties on his official bond were not liable for his misapplication of it. *Mills v. Allen*, 7 Jones, 564.

74. The Revised Code, ch. 29, sec. 5, intends that the motion for summary judgment against delinquent sheriffs and their sureties shall be first made in the county court. *Buchanan v. McKenzie*, 8 Jones, 95.

75. The Revised Code, ch. 78, secs. 1 and 2, which gives an action against a sheriff on his official bond for money collected by virtue of his office, expressly reserves the option of suing in case, by the party injured, for the same cause of action. *Fagan v. Williamson*, 8 Jones, 433.

76. If the party sue in case, a previous action on the sheriff's official bond and a nonsuit therein, is a sufficient demand to sustain the latter action. *Ibid.*

77. Where a debtor lived in one county, and had places of business in two adjoining counties, and it appeared that a sheriff, who acted as collecting officer, went only three times during three months to the debtor's residence, at the end of which time the debtor became insolvent, *it was held* that the sheriff and his sureties were liable on his bond for negligence, although it appeared that the debtor was very frequently absent from home during that time. *McLean v. Buchanan*, 8 Jones, 444.

78. A sheriff, who has received the note of a *feme covert* within a justice's jurisdiction for collection, is not guilty of negligence so as to subject him on his official bond, for failing to take out a warrant on the claim. *Graham v. Buchanan*, 1 Winst., 93.

79. Where the deputy of a sheriff received the bond of a married woman within a justice's jurisdiction for collection, and failed to collect the same during the sheriff's official term, but afterwards, when acting as the deputy of his successor, collected it and failed to pay over the money, *it was held* that there was no breach of the former sheriff's official hand. *Ibid.*

See (Action on the case—Deceit, 35–36.) (Insolvent Debtors—Proceedings under the act of 1822, and subsequent acts, 17–18.) (Limitations—Of actions on official bonds, 1–2–3.) (Sheriff—

Liability as bail.) (Sheriff—Liability for escapes.) (Sheriff—Duty of sheriffs in relation to process issued to them, its execution and return.) (Trespass—To persons and personal property, when it will lie, 14.)

V. LIABILITY OF SHERIFFS FOR THEIR DEPUTIES.

1. In an action against a sheriff for the misconduct of a person alleged to be his deputy, it is not necessary to produce a written deputation, or give notice to the sheriff to produce it. It is sufficient to show that the person acted as deputy with the consent and privity of the sheriff. *State v. McIntosh*, 2 Ired., 53.

2. Under the Revised Statutes, ch. 109, sec. 23, an action may be supported on the official bond of the sheriff for the neglect of his deputy to collect a claim put into his hands for collection, although the amount of the claim is within the jurisdiction of a single justice; as justices may direct their warrants as well to sheriffs as to constables. *State v. Roane*, 2 Ired., 144. (See Rev. Code, ch. 105, sec. 23.)

3. It is no defence to such an action, that after the default of the deputy the plaintiff has endeavored, though unsuccessfully, to collect his claim, himself, from his debtor. *Ibid.*

4. The sheriff is liable for a trespass committed by his deputy in seizing the property of A, in an execution against B. *Satterwhite v. Carson*, 3 Ired., 549.

5. Where money has been collected by a deputy sheriff, by virtue of his office, a demand on him for the money and his refusal to pay it are equivalent to a demand and refusal on the part of the sheriff, and will enable the person injured to sustain an action against the latter. *Lyle v. Wilson*, 4 Ired., 226.

6. It is not necessary, in an action against a sheriff for the misconduct of a person who acted as his deputy, to show a written deputation, there being, indeed, no law which requires the deputation of a sheriff to be in writing. It is sufficient to show that the person acted generally as deputy, without going back to his appointment. *State v. Allen*, 5 Ired., 36.

7. The sheriff is subject to the payment of twelve *per cent.* interest, on moneys collected and not properly accounted for, under the act of assembly, although the default was that of his deputy. *Ibid.* (See Rev. Code, ch. 78, sec. 6.)

8. The ignorance of a sheriff's deputy, who makes a false return, does not excuse the sheriff from the penalty for such false return. *Houser v. Hampton*, 7 Ired., 333.

9. A sheriff cannot be made responsible for the acts of a constable, who sometimes acted as his deputy, but never without special deputation, and who has committed a trespass by levying a void attachment, unless it can be shown that he was expressly authorized by the sheriff to levy such attachment. Much less

can he be responsible, when the constable returns the attachment levied by him *as constable*, although by an order of court the return is permitted to be amended by stating the levy to have been made by *the sheriff* by the said constable as his deputy, the sheriff's office having then expired and the order of amendment having been appealed from. *Patterson v. Britt*, 11 Ired., 383.

10. The appointment of a deputy on the nomination of the creditor will not discharge the sheriff from liability for the wrongful act of the deputy, unless there be collusion or a want of good faith in the creditor in making the nomination. *Martin v. Martin*, 2 Jones, 285.

11. Where a writ of *capias ad respondendum* was executed, and returned by a deputy sheriff in these words, "Executed. P. R. Tomlinson, D. Sheriff;" *it was held* that the return was sufficient to make the sheriff liable as special bail for the omission of his deputy to take bail on executing the writ. *Washington v. Vinson*, 4 Jones, 380.

See (Assumpsit—When it will or will not lie, 29.) (Sheriff—Authority of sheriffs, and remedy for them, 16–17–18.) (Sheriff—Of the liability of sheriffs and their sureties, 24.) (Trespass—To persons and personal property; when it will lie, 14.)

VI. LIABILITY OF SHERIFFS AS BAIL.

1. An action will not lie against a sheriff for an escape upon *mesne process*; but he ought to be proceeded against as bail, under the act of 1777. (Revised Code, ch. 11.) *Sweepon v. Whitaker*, 1 Hay., 224, (257.)

2. But the returning of an "escape" by a sheriff excludes the idea of his being bail, and makes him liable for the escape. *Tuton v. Sheriff of Wake*, 1 Hay., 485, (559.) S. P., *Hart v. Lanier*, 3 Hawks, 244.

3. When one has qualified and acted as sheriff, he shall not be heard to object that he was not legally a sheriff, to avoid subjecting himself to the responsibility of special bail upon executing process. *Stuart v. Fitzgerald*, 2 Murph., 255. S. C., 1 Car., L. R. 234, (17.)

4. A sheriff is not liable in debt upon his bond for not having taking bail in a civil cause; he should be proceeded against as bail, by a *sci. fa.* *Governor v. Jones*, 2 Hawks, 359.

5. The sheriff must be proceeded against by *sci. fa.* as bail, for not taking bail upon a *capias* in equity; and an action on the case will not lie against him for such failure or neglect. *Troy v. Williamson*, 1 Dev. and Bat., 252. (See Rev. Code, ch. 10, sec. 1.)

6. A sheriff on a writ of *capias ad respondendum* returned as follows: "Executed; the defendant is confined in the jail of my

county on a *ca. sa.* issued by a justice of the peace in favor of A. B., consequently he cannot at present be carried to the court." The plaintiff obtained a judgment in his suit and issued a *ca. sa.* to the same sheriff who returned on it "not to be found;" *it was held* that the sheriff was not answerable as bail. *Montgomery v. McAlpin*, 1 Ired., 463.

7. The return of the sheriff in such a case, that the body of the defendant is in the prison of his county under other process, is a return that he *keeps* the body of such prisoner there under the process so returned, and is tantamount to a commitment under this process. After this the *sheriff* cannot take bail, but if he release the prisoner, or permit him to depart from the prison, without a rule or order of court, he is guilty of an escape. After such a commitment the prisoner can only be admitted to bail *in court*. *Ibid.*

8. A sheriff was bail for A and B against whom there was a joint action; and a *ca. sa.* issued upon the judgment against them. B was not to be found. but the *ca. sa.* was executed on A, and the sheriff voluntarily permitted him to escape, but afterwards retook him; and *it was held* that this recaption was unlawful, and that the assent of the plaintiff, after such recaption, that A should not be held in custody, did not operate as a satisfaction of the judgment, nor did it deprive the plaintiff of his remedy against the sheriff as the bail of B. *Jackson v. Hampton*, 6 Ired., 34.

9. Where a judgment was obtained against two or more, and no bail bond had been taken from either of the defendants in the suit, and the sheriff, who had thus become bail for all, after the rendition of the judgment and the issuing of the *ca. sa.*, was directed by the plaintiff not to serve the *ca. sa.* on one of the defendants, he *was held* to be still liable as bail, for not surrendering the other defendant. *Jackson v. Hampton*, 10 Ired., 579.

10. A sheriff is not liable as special bail, after he has committed a defendant on *mesne* process, though such defendant be by him permitted to go at large. *Buffalow v. Hussey*, Busb., 237.

11. Where a *sci. fa.* was issued against a sheriff to charge him as special bail for a person sued at the instance of the plaintiff, and who had been, for want of bail, committed to jail in the sheriff's county, and afterwards discharged as an insolvent by two justices, *it was held* that the sheriff was not liable as special bail. *Ibid.*

12. If the plaintiff in a writ fail to except to a bail bond, or to notify the sheriff that he holds him as special bail, he cannot subject him as such. *Watt v. Johnson*, 3 Jones, 124.

13. Where a sheriff, upon executing a writ, took a bail bond which had on it the usual form of an assignment to the plaintiff, with his, the sheriff's, name in the body of it, but not signed and sealed by him, *it was held* to be no assignment such as the law

required before the Rev. Code went into operation, and that he had thereby rendered himself liable as special bail. *Hardy v. Andrews*, 4 Jones, 476.

14. Upon exception taken to bail, the plaintiff must, in order to charge the sheriff, give him notice and obtain an order declaring the insufficiency of the bail and adjudging him to be special bail; and after a trial and judgment in the principal suit, it is too late to proceed against the sheriff with the purpose of subjecting him as bail. *Worth v. Winbourne*, 7 Jones, 431.

See (Sheriff—Liability of sheriffs for their deputies, 11.)

VII. LIABILITY OF SHERIFFS FOR ESCAPES.

1. If a sheriff, constable or other officer, not authorized by his precept to arrest, does arrest and afterwards suffer the defendant to go at large, he is not liable for an escape. *Lutterloh v. Powell*, 1 Hay., 395, (455.) S. P., *Ellis v. Gee*, 1 Murph., 445.

2. In all cases of escape, after a debtor is committed to jail, the sheriff is liable, however innocent he may be, unless the escape has been caused by the act of God, or the public enemies. *Rainey v. Dunning*, 2 Murph., 386.

3. In debt on a sheriff's bond for an escape, it is proper for the jury to consider the damages really sustained by the escape, and they are not bound to give the whole sum due from the original debtor. *Governor v. Matlock*, 1 Hawks, 425.

4. If a sheriff give his prisoner the keys of the prison, it is an escape, though the prisoner should not go without the walls. *Wilkes v. Slaughter*, 3 Hawks, 211.

5. Where, on a judgment recovered, the defendant is committed in execution to the sheriff, either upon a *ca. sa.* or upon an order of commitment, on his petition for the benefit of the insolvent debtor's law, and his failure to entitle himself thereto, and the sheriff *voluntarily* permits him to escape, the sheriff is liable for the debt, even though he may afterwards retake his prisoner. *Lash v. Ziglar*, 5 Ired., 702.

6. The plaintiff may, in such case, affirm the prisoner to be in prison at his suit, but such affirmation requires a positive act, as it will not be presumed. *Ibid.*

7. The plaintiff cannot, in his action against the sheriff for such voluntary escape, recover more than the amount of the debt, interest and costs, at the time of the escape. *Ibid.*

8. Where the plaintiff had two judgments against the defendant, and it appeared from the records that the defendant was ordered into custody only on one, the sheriff is liable for the amount of that one alone. *Ibid.*

9. The act of 1777 alters the law, as it was under the stat. 4, Ed. 3, by giving the action of debt for an escape against the executor of the sheriff, as well as to the executor of the creditor.

Wright v. Roberts, 6 Ired., 119. (See Rev. Code, ch. 105, sec. 20.)

10. An action of debt will lie against a sheriff under our statute for a negligent escape of a prisoner confined for debt, even though there was no actual negligence. *Adams v. Turrentine*, 8 Ired., 147. (See Rev. Code, ch. 105, sec. 20.)

11. There are only two kinds of escapes known to our law, of a prisoner confined for debt—one voluntary, and the other negligent—except where the prisoner escaped by the act of God or of the enemies of our country. The only difference as to the liability of the officer, between the two kinds of escape, is that in the case of voluntary escape he is liable absolutely; but in the case of negligent escape he has a right to retake the prisoner; and if he do retake him upon fresh pursuit, he is not liable to an action brought after such recaption, and when he has the prisoner in custody. *Ibid.*

12. The meaning of the term “negligent escape” in our statute is the same that was given to that term at the common law. *Ibid.*

13. Nothing can excuse the sheriff for the escape of a debtor committed to his custody, but the act of God or the enemies of the country. *Mabry v. Turrentine*, 8 Ired., 201.

14. A judgment was recovered in the county court of S against B, on which a *ca. sa.* was issued to S. county, to which the sheriff returned “*non est inventus*—the defendant in H. jail.” The plaintiff then sued out a *sci. fa.* against the bail of B, and they pleaded that “their principal was then confined as a lawful prisoner in the jail of O. county,” and the jury so found; whereupon the following entry was made; “It being made appear to the court, that B is now confined under legal process in the jail of O. county, and it appearing that the said B is indebted to the plaintiff in the sum of, &c., it is therefore ordered that notice be issued to the sheriff and jailer of O. county, commanding them to retain the said B in prison until he shall pay and satisfy the said debt and costs to the plaintiff, or until the said B be otherwise discharged by due course of law;” and notice of this order was duly served on the sheriff of O. county. *It was held* that, by virtue thereof, the said B was duly committed to the sheriff of O. county, as on a *ca. sa.*, and that, upon the escape of the said B, the sheriff of O. was responsible to the plaintiff, in the same manner and to the same extent as if B had been committed on a *ca. sa.*; and *it was held further*, that, although the order may have been made nominally in the suit against the bail, yet that suit was in law but a continuation of the suit against the principal. *Ibid.*

15. Where a prisoner for debt escapes, the officer, in an action against him for the escape, can only excuse himself by showing that he has not only made fresh pursuit, but also that he has

actually recaptured the prisoner before suit brought; and without this, fresh pursit will not excuse the officer, even though the prisoner die, before the officer has it in his power, by due diligence, to recapture him. *Whicher v. Roberts*, 10 Ired., 485.

16. In this state, the defence of fresh pursuit and recapture need not be by plea, but may be made on the general issue. *Ibid.*

17. It is not an escape in a sheriff to permit the door of the room of a debtor, committed to close prison under a *ca. sa.*, to be left open, unless the debtor actually goes out of his room. *Currie v. Worthy*, 2 Jones, 104. (See Rev. Code, ch. 105, sec. 20.)

18. To render a sheriff liable for the escape of an insolvent debtor surrendered in open court, it is necessary that such insolvent was committed to the sheriff's custody by an order of the court; and a mere prayer for such order is not sufficient. *Siler v. McKee*, 2 Jones, 379.

19. A creditor, who opposes the discharge of his debtor who is in execution under a *ca. sa.*, may still sue the sheriff for an escape of which he had knowledge at the time he opposed the discharge. *Currie v. Worthy*, 3 Jones, 315.

20. Under the act, Rev. Stat., ch. 109, sec. 20, the plaintiff is entitled to interest on a recovery in debt for an escape against the sheriff, in the same way that he would be entitled to it against the debtor. (See Rev. Code, ch. 105, sec. 20.)

21. In an action of debt on a sheriff's bond for the escape of a debtor imprisoned under a *ca. sa.*, the jury are not bound to give the full amount of the debt due the plaintiff in the execution, as they would be in an action directly against the sheriff himself, but should give only the damages actually sustained by the plaintiff on account of the escape. *Willey v. Eure*, 8 Jones, 320.

See (Insolvent Debtors—Proceedings under the act of 1822 and subsequent acts, 2-43.) (Sheriffs—Liability as bail, 1-2 7-10.)

VIII. WHERE THE DEFENDANT IN THE PROCESS IS SHERIFF, AND OF SUCCESSIVE SHERIFFS.

1. Where a sheriff levied an execution and returned "levied and no sale for want of bidders;" and a *vend. expo.* issued to the same officer, who, going out of office, delivered it to his successor, but did not point out to him the property levied; *held* that the late sheriff was rightly amerced, as he ought to have made a return on the writ of *vend. expo.*, and should have sold the property, without a *vend. expo.*; *held* also to be proper to issue a writ of *di ringas* to the new sheriff, to compel the old sheriff, by *distress*, to levy the money and deliver it to the new sheriff to be brought into court. *Anonymous*, 1 Hay., 415, (479.)

2. When the sheriff of a county is defendant and there is no

coroner, process may be issued to the sheriff of an adjoining county. *Anonymous*, 1 Hay., 422, (487.) (See Rev. Code, ch. 31, sec. 55.)

3. A *vend. expo.* can issue only to the sheriff who made the levy. *Governor v. Eastwood*, 1 Dev., 157. (See *contra*, sec. 5, *post*.)

4. A writ of *vend. expo.* directed "to the sheriff," for the sale of land levied upon by a sheriff who has gone out of office, will not authorize a sale of land by such late sheriff, for whatever power is granted by the writ is given to him to whom it is directed. *Tarkinton v. Alexander*, 2 Dev. and Bat., 87.

5. An ex-sheriff cannot sell lands levied on by him under a *fi. fa.* while he was in office, without a *vend. expo.* directed to him; and, it seems, that when a sheriff has levied upon lands which remain unsold until he goes out of office, the *vend. expo.* should issue to his successor, and not to him. *Ibid*.

6. When a sheriff has levied upon both lands and goods and gone out of office, a general *vend. expo.* may issue to the new sheriff, but if he cannot get the goods from the old sheriff a *distringas* should issue to him to compel the old sheriff to sell the goods; to which may be added a special *vend. expo.*, in case the money thereby raised be not sufficient to satisfy the judgment, authorizing the new sheriff to sell the land; or, if the plaintiff choose to waive the levy, a special *fi. fa.* to the new sheriff for levying the residue. *Ibid*.

7. A former sheriff has no authority to act under a writ directed to his successor, and therefore a writing, purporting to be a return by the former sheriff made upon such writ, is not in law a return, and of course not a part of the record in that suit. Nor is a receipt expressed to be in full upon such execution, given by one admitted to be, but not appearing on the record to be, the real plaintiff, to the former sheriff, an acknowledgment of record to the satisfaction of the judgment. It is but evidence *in pais* of the fact of payment, which may therefore be met by other testimony to explain or disprove that fact. *Spruill v. Bateman*, 4 Dev. and Bat., 489.

8. When land has been sold by a sheriff under execution, and he dies before making a conveyance, the succeeding sheriff cannot make the conveyance, unless the purchase money has been paid to the sheriff who sold. *Harris v. Irwin*, 7 Ired., 432.

See (Sheriff—Of the liability of sheriffs and their sureties, 22.)

IX. SALES BY SHERIFFS.

1. A sheriff cannot purchase at his own sale. *Anonymous*, 1 Hay., 2, S. P. *Ormond v. Faircloth*, 2 Hay., 336, (512,) S. C. Conf. Rep., 550, (573,) S. C. 1 Murph., 35. See also *Corbin v. Waller*, 2 Hay., 108, (266.)

2. A sale of land by a sheriff when there is sufficient personal

property is good as to the purchasers. *Osborne v. Woodson*, 1 Hay., 24, (22.)

3. The want of forty days advertisement will not vitiate the sale of land; nor will a sale made a day or two after the time appointed, the sheriff having a right to adjourn his sale. *Ibid.*

4. The sheriff may lawfully sell the defendant's land, when he does not show sufficient personal property to satisfy the execution; but if he sell the land first, when sufficient personal property is shown him, he may be liable to the action of the party aggrieved. *Ibid.*

5. A sheriff must proceed to sell if only one bidder attends. *State v. Joyce*, 1 Hay., 43, (54.)

6. The sheriff must sell though there be but one bidder, but he must be one who has money to pay his bid; and if he have not the money, the sheriff ought to reject his bid, and sell to the highest bidder who has the money ready to pay. *State v. Johnson*, 1 Hay., 293, (338.)

7. Where a sheriff levies on personal property, he should take it into actual possession, and have it present and shown to the bidder at the time of sale. *Blount v. Mitchell*, Tay., 131, (80.) S. C. 2 Hay., 65, (233.) S. P. *Ainsworth v. Greenlee*, 3 Murph., 470.

8. If by consent a large quantity of effects are put up together, sold at one bid, and purchased by the plaintiff in the execution, who colludes with the defendant therein to defeat the claims of other creditors, the sale is void. *Brodie v. Seagraves*, Tay., 144, (90.)

9. A sheriff cannot sell at private sale property levied on by execution. *Ormond Faircloth*, 1 Murph., 35, S. C. 2 Hay., 336, (512.) Conf. Rep. 550, (573.)

10. The sheriff, having levied executions on the defendant's property, may by the consent of the plaintiff and defendant in the execution be agent of the defendant for the sale of the property privately, and the defendant may sue on the contract of sale thus made by the sheriff or his agent. *Jones v. Loftin*, 2 Hawks, 199.

11. A sheriff may, under the act of 1820, postpone a sale, and the reasons for a postponement must, to a certain extent, be judged of by him. *Pope v. Bradley*, 3 Hawks, 16. (See Rev. Code, ch. 45, sec. 14.)

12. A sheriff may, at his discretion, sell land under an execution by the acre. And where he sells by the acre, he must have a survey made of the land sold, or the boundaries so described in his deed to the purchaser, as to identify the part sold; and he must be particular in describing the locality of the acres to the bidders at the sale. *Davis v. Abbott*, 3 Ired., 137.

13. An irregularity by the sheriff in making a sale under an execution can only be objected to by him whose property is sold.

under the execution, or by those claiming under him. *Hollowell v. Skinner*, 4 Ired., 165.

14. By the operation of the private and local act of 1823, ch. 74, sales of land under execution in the counties therein named are, as to the places of sale, put on the same footing as sales before the act of 1820, which directed them to be at the court house; and in those counties, the sheriff may now sell lands under execution at such places as he in his sound discretion shall judge most expedient. *Grandy v. Morris*, 6 Ired., 433.

15. Under the acts of 1820, 1821 and 1822, the sales of land under execution, in the county of Currituck, are excepted from the general provisions of those acts, directing the places where such sales should be made; in Currituck county, therefore, lands may be sold under execution by the sheriff, at any place which in his sound discretion he deems most proper. *Humphries v. Baxter*, 6 Ired., 437.

16. The law points out no particular mode, in which a sheriff shall conduct his sales under executions, but he is bound by principle to sell the property levied on in such way as will probably raise the most money. *Jones v. Lewis*, 8 Ired., 70.

17. Where a sheriff had an execution against two persons, each owning an undivided fifth part of a tract of land, and he sold both their interests together, *it was held* that the sale was not void in law, but, if objected to, should have been left to a jury to determine as a matter of fact, whether the sale was properly conducted or not. *Ibid.*

18. Articles of personal property, sold under execution, must be actually present, but they need not be literally in the sheriff's hands or directly under his hammer; it is sufficient if they are in such a situation that the bidders can see them and have an opportunity of examining their quality and value. *McNeely v. Hart*, 8 Ired. 492

19. Upon the facts stated in evidence, it is a question of law for the court, and not of fact for the jury, whether the articles sold were present or not. *Ibid.*

20. The fact that an article of personal property had been, previously on the same day, shown to the bidders, cannot avoid the effect of their absence at the time and place of the sale. *Ibid.*

21. The sale must be conducted in such a manner that every person who may come up before the article is knocked down by the auctioneer, may see and examine it, so as to enable him to become a bidder, if he choose. *Ibid.*

22. A sheriff cannot buy, as agent for another, at a sale made by him under execution, and his deed to such purchaser passes no title. *McLeod v. McCall*, 3 Jones, 87.

23. A sheriff cannot buy at his own sale either in person or by an agent. *Stewart v. Rutherford*, 4 Jones, 483.

24. Where a sheriff, under an execution regularly issued, mis-

conducts himself in making sale under it, it furnishes no ground for setting aside the execution; because the party injured has a remedy against the officer. *Nixon v. Harrell*, 5 Jones, 76.

25. Where a purchaser at a sheriff's sale failed to pay the money bid, which fact was returned upon the execution, and a new process issued to sell the land, under which it was sold for a less price than was bid at the former sale, *it was held* that the sheriff was not entitled to recover the difference between the sum bid at the former sale and the price it was sold for at the latter sale. *Grier v. Yontz*, 5 Jones, 371.

See (Execution—Levy, sale and application of the money raised.) (Execution—Purchaser at execution sale.)

X. AMENDMENT OF SHERIFF'S RETURNS.

1. A sheriff, upon an irregular execution against the estate of B, who was dead, levied upon and sold a negro bequeathed by B to a legatee, to which legacy the executor had assented, though this fact was unknown to the sheriff. The legatee sued the sheriff and recovered the value of the negro, and then the sheriff was permitted, on his motion, to amend his return on the execution, so as to set forth the fact that there was no property of B to be found; and also to withdraw from the office the money he had paid in on the execution. *Smith v. Daniel*, 3 Murph., 128.

2. The sheriff may be permitted to make a return upon an execution, or to amend it according to the truth of the case, at any time after the return day, even when important consequences as to the rights of the parties, may be produced by such amendment. *Ibid.*

3. A sheriff should not be permitted to amend his return to a *fi. fa.* to the injury of strangers to the record, and this especially after the lapse of sixteen years: but, when on a rule obtained, he was directed by the superior court to amend, *it was held* that the opposite party could not appeal from the order. *Davidson v. Cowan*, 1 Dev., 304.

4. The county court has a right to permit a sheriff to amend his return on an execution to that court, by striking out a return of a levy and sale, and returning *nulla bona*. If, upon an appeal from this decision, the superior court undertakes, without its appearing on its records that it had examined into the merits of the case to reverse this order, it must be presumed to be done on the ground that the county court had no legal authority to make such an amendment; and, therefore, the superior was in error, and *its* decision must be reversed, and that of the county court affirmed. *Dickinson v. Lippitt*, 5 Ired., 560.

5. Where a sheriff returned an attachment levied on certain property, and was afterwards permitted by the court, to which the return was made, to amend his return, by stating that the

property had been levied on by executions having priority to the attachment, *it was held* that he could not be held responsible on his first return; for that the record, as amended, must be taken to be true. *Cady v. Quinn*, 6 Ired., 191.

6. If an interlineation appear on the face of an officer's return, and there is no evidence to show when it was done, the court will presume that it was done before the return was made, when the officer had authority to alter his return. *Sloan v. Stanly*, 11 Ired., 627.

XI. COMPENSATION TO SHERIFFS.

1. Sheriffs are in no instances entitled to costs for services, other than what shall appear of record by the return of precepts to them directed. *Moore v. Islar*, Mar., 78, (81.)

2. When a sheriff levies and advertises a sale, but, in consequence of the payment of the debt to the plaintiff, does not actually sell, he is nevertheless entitled to commissions on the whole debt. *Mattock v. Gray*, 4 Hawks, 1.

3. When a sheriff can do no official act under a writ, as to sell goods under a *vend. expo.* when the *fi. fa.* was levied by his predecessor, he is not entitled to commissions. *Sanderson v. Rogers*, 3 Dev. 38.

4. A sheriff is not entitled to commissions upon a *fi. fa.*, though the defendant pay the money to the plaintiff while the *fi. fa.* is in the sheriff's hands, if, at the time, the defendant held no property upon which the *fi. fa.* could be levied. *Siler v. Blake*, 3 Dev. and Bat., 93.

5. Where one against whom a *fi. fa.* has issued pays the amount to the plaintiff in the execution, the sheriff, who did not levy the execution before the return day, whereby it became *functus officio* and was not, in law, in his hands at the time of the payment, is not entitled to recover commissions from the defendant in the execution, without an express promise to pay them. *Kincaid v. Smith*, 13 Ired., 496.

See (Executors and Administrators—Of their liability to creditors, &c., 57.)

SLANDER.

See (Action on the case—For slander.)

SLAVES.

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| I. Of suits for freedom. | VI. Of offences against the persons of slaves. |
| II. Of the emancipation of slaves. | VII. Of offences committed by slaves. |
| III. Sales and gifts of slaves. | VIII. Of the harbouring of slaves. |
| IV. Increase of slaves | IX. Of offences in the treatment of, or dealing with, slaves. |
| V. Of a master's liability for the contracts or acts of his slave. | |

NOTE.—Slavery is now abolished in North Carolina. By an ordinance of the Convention of 1865, ratified on the 9th day of October of that year, it is declared, "That slavery and involuntary servitude, otherwise than for crimes, whereof the party shall have been duly convicted, shall be, and is hereby prohibited within the State."

I. OF SUITS FOR FREEDOM.

1. The proper action, to try the question of freedom between a colored person and his claimant, is trespass and false imprisonment, to which the defendant may plead that the plaintiff is a slave, and cannot maintain an action, to which the plaintiff replies that he is not a slave, and upon this point an issue is made up and submitted to a jury. *Evans v. Kennedy*, 1 Hay., 422, (487.)

2. In such action, the defendant may be required to give security for the plaintiff's appearance, and to treat him with humanity, and also to allow him time to procure testimony. *Ibid.* S. P., *Gobu v. Gobu*, 2 Hay., 127, (289.)

3. If a negro sue for his freedom, he may, if necessary, have a writ of *habeas corpus*, and, in a probable case in his favor, his claimant will be compelled to let him go at large to procure his testimony. *Parker v. —*, 2 Hay., 345, (528.)

4. In an action to try the right of a person of color to his freedom, where the question was, whether the maternal grandmother and mother had, or had not, for a long time been treated and regarded as free, *it was held* that a bill of sale for the plaintiff, their descendant, was not material; but that an attachment levied upon the grandmother was pertinent and proper evidence. *Brookfield v. Stanton*, 6 Jones, 156.

5. Where a person was born free, no length of illegal and usurped dominion over him can make him a slave. *Ibid.*

See (Evidence—Presumptions, 4-34-38.)

II. OF THE EMANCIPATION OF SLAVES.

1. Where slaves were directed by will to be divided among the testator's wife and children until the laws of the State would permit them to be emancipated, at which time the executor was to have it done, *it was held* that after the executor had deliver-

ed over the slaves to the wife and children, his trust ceased, and he no longer had power to take steps for their emancipation. *Pride v. Pulliam*, 4 Hawks, 49.

2. A deed conveying slaves to the trustees of a religious society, for the use of the society, vests no beneficial interest in the trustees individually; and if it be intended to confer on the slaves the rights of freemen, while they are nominally held in bondage, it is inoperative as being against public policy. *White v. White*, 1 Dev. and Bat., 260.

3. The manumission of a slave is the act of the owner; and although various acts of assembly have restrained and regulated the power of the owner to emancipate, yet none have taken it from him, and vested it in a judicial tribunal. *Bryan v. Wadsworth*, 1 Dev. and Bat., 384.

4. A petition filed in the county court (before the act of 1830) praying permission to emancipate a slave "at such time as the owner may think proper," and a decree of the court granting such permission, "upon the owner's complying with the directions of the acts of the general assembly in such cases provided," is not a valid act of liberation, within the purview of our acts of assembly, where no other proceedings appear upon the record. *Ibid.* (For the manner in which slaves are now to be emancipated, see Rev. Code, ch. 107, secs. 46 to 50.)

5. The giving of the bonds required from the owner of a liberated slave and filing them in the county court form no part of an act of emancipation, and will not aid a defective act of liberation. *Ibid.*

6. *It seems*, that to constitute an act of liberation entered of record under our acts of assembly prior to 1830, it is only necessary that there should be a petition filed by the owner, making the proper allegations and expressing his desire then to confer freedom on his slave and praying permission to do so, and that the court should, by a proper adjudication, grant the permission prayed for. *Ibid.*

7. The legislature cannot emancipate a slave without the consent of the owner. *Ibid.*

8. A record of the county court stating, that "upon the petition" of the master "it is ordered" that the slave "be emancipated and set free from slavery," is sufficient evidence under the act of 1796, of the emancipation, without showing any petition in writing. *Sampson v. Burgwyn*, 3 Dev. and Bat., 28. (For the present law on this subject, see Rev. Code, ch. 107, sec. 49.)

9. An order of the county court, emancipating a slave under that act, without stating that the slave had performed meritorious services, is conclusive, being the act of a court of exclusive jurisdiction, and cannot be impeached by showing that the slave had not, or could not have, performed such services. *Ibid.*

10. Where a testator, residing in Virginia where the law al-

lowed masters to liberate their slaves by deed or will, bequeathed as follows: "My will is that my negro woman P. shall have her freedom immediately; and that all the rest of my black people shall serve until my youngest child shall be of the age of twenty-one years, for the use of raising my children and young negroes. After my youngest child is of age, my will is that all my negroes shall be free:" *it was held* that the child of one of the negro women mentioned in the will, born after the death of the testator, but before his youngest child came of age, was entitled to freedom after the latter event. *Campbell v. Street*, 1 Ired., 109.

11. By the law of Virginia a man is permitted to emancipate his slave by deed, the emancipation to take effect at any time prescribed in the deed subsequent to its date; and where such a deed of emancipation for a female slave was executed in Virginia, and such slave came to this state, and, before the time appointed for the emancipation to take effect, had issue, *it was held* that the issue, so born, were slaves. *Mayho v. Sears*, 3 Ired., 224.

12. Where, on the petition of an executor in pursuance of the directions of his testator, an order was passed by a county court in 1805, "that the said executor have leave to emancipate his said slave, he first giving bond and security as required by law, and the bond was not given till 1816, and ever since that order, until the year 1846, the said slave and her children had been permitted to enjoy all the rights of free persons of color, *it was held* that neither the executor, whose duty it was to give the bond, nor any person claiming under or through him, could take advantage of that omission, much less a wrongdoer, after the lapse of so many years. *Cully v. Jones*, 9 Ired., 168.

13. A court in this state cannot presume that the emancipation of slaves is void by the laws or policy of South-Carolina, but the fact, if it be so, must be proved. *Jones v. Abernathy*, 11 Ired., 280.

14. On a petition under our act, for permission to emancipate a slave, the right of property in the slave cannot be determined. If a claim of right of property, supported by affidavit or otherwise, be set up in opposition to the right asserted by the petitioner, the court should stay proceedings on the petition, until this matter can be determined between the parties, in an action at law or in equity. *Caffey v. Rankin*, 11 Ired., 449. (See Rev. Code, ch. 107, sec. 46.)

15. The plaintiff claiming to be free produced a record of C. county court in 1807, setting forth a petition in the name of W. J., praying for liberty to emancipate certain slaves owned by him for meritorious services, the order of the court that W. J. have leave to emancipate the slaves mentioned, and the copy of the bond filed, as directed by the act of 1796, and *it was held* that the emancipation of the said slaves was completely effected

by these proceedings; that the petition setting forth the master's wish, *then* to emancipate for meritorious services, the judgment of the court, and the granting to the master liberty to emancipate, being entered of record, made the liberation required by law. *Stringer v. Burcham*, 12 Ired., 41. (See Rev. Code, ch. 107, sec. 49.)

16. After an acquiescence for thirty years, by the public, in the enjoyment of her freedom by one claiming to be free, every presumption is to be made in favor of her actual emancipation, especially as against a trespasser and wrongdoer. *Ibid.*

17. An order of court, obtained on the motion of an attorney on behalf of a person, is presumed to have been done at that person's instance until he takes steps to vacate the proceeding. Hence, an order of the county court for the emancipation of a slave, procured on motion of an attorney in the name of the owner, was a valid act of emancipation before the act of 1830, notwithstanding that the owner's consent does not otherwise appear. Especially is such order valid, when it appears of record that the owner, at a subsequent time, entered into bond agreeably to law, (reciting the former proceeding) to keep the negro from becoming chargeable, &c. *Allen v. Allen*, Busb. 60.

18. Where the owner of a slave permitted another to institute proceedings for his emancipation, and assisted in carrying them on, and then acquiesced for more than thirty years in the judgment of the court in favor of his freedom, *it was held* that, whether the proceedings were regular or not, the owner was bound by them. *Jarman v. Humphrey*, 6 Jones, 28.

19. Where a person of color has for more than thirty years been treated and regarded, both by the community in which he has lived and by his former owner, as a free person, every presumption should be made that he was actually emancipated according to the requirements of the law. *Ibid.*

20. Where it was found that the maternal grandmother and mother of the plaintiff had once been slaves, but for thirty years and more had been regarded and treated as free persons, *it was held* to be proper for the court to instruct the jury, that they ought to presume their emancipation in some mode prescribed by law. *Brookfield v. Stanton*, 6 Jones, 156.

21. That a person of color "was generally reputed to be free and had acted and passed as a free man, in the neighborhood where he lived," is as competent when it operates against him to prove that he is free, as when it operates in his favor. *State v. Patrick*, 6 Jones, 308.

See (Constitution—Acts which have been declared to be unconstitutional, 4.)

III. SALE AND GIFTS OF SLAVES.

1. Under the act of 1784, (ch. 225, sec. 7, of the Rev. Code, of 1820; see 1 Rev. Stat., ch. 37, sec. 19, and Rev. Code, ch. 37, sec. 19,) a parol conveyance of slaves was good as between the parties, but was void as to creditors, both those who were so at the time and those who became so afterwards. *Knight v. Thomas*, 1 Hay., 289, (333.)

2. An unattested bill of sale for slaves is good, as between vendor and vendee; and so also is an unregistered bill of sale for slaves. *Cutlar v. Spiller*, 2 Hay., 61, (228.) S. P., *Lynch v. Ashe*, 1 Hawks, 338., *Rhodes v. Holmes*, 2 Hawks, 193.

3. A person, who is an honest purchaser of a slave, without notice of his illegal importation, and who afterwards sells him, having notice of that fact, is not liable to the forfeiture under the act of 1704. *Governor v. Howard*, 1 Murph., 168. (The act has been since superseded.)

4. The object of the act of 1784 and 1792, relative to the sale of slaves, was to protect creditors and purchasers. Neither of these acts applies to a case where the interest of a creditor or purchaser is not concerned. A bill of sale or delivery is necessary in every case where their rights are affected; but between the parties themselves, a *bona fide* sale according to the rules of the common law transfers the property, and is good without a bill of sale or delivery. *Bateman v. Bateman*, 2 Murph., 97., S. P., as to mortgage, *Cotton v. Powell*, 2 Car., L. R., 431, (313.)

5. The delivery by the sheriff, to a purchaser at an execution sale, of a bill of sale for a slave, if there be no adverse possession in another, is a delivery of the slave. *Cummings v. McGill*, 2 Murph., 357.

6. The act of 1806, requiring gifts of slaves to be authenticated by writing, cannot be evaded by a fictitious sale; therefore, where the donor gave the donee the purchase money, and then sold and delivered the slave, receiving back the money, this was held to be a gift and void without a deed. *Smith v. Yeates*, 1 Dev., 302.

7. A writing conveying a slave is void as a deed of gift or bill of sale, unless attested by a subscribing witness. But the sale of a slave, accompanied by an actual delivery, is good without a bill of sale. *Ibid.*

8. An assignment of slaves, not under seal, is void unless accompanied by a delivery of possession. *Atkinson v. Clarke*, 3 Dev., 171.

9. Delivery of a slave, in order to vest the title in the vendee, need not be by manual touching of him, but must be by some act proving unequivocally that the possession is changed. *Mushat v. Brevard*, 4 Dev., 73.

10. One claiming a slave, against a subsequent purchaser from

his vendor, must produce a bill of sale properly attested and registered, or prove a delivery of possession which will dispense with it. And where a slave was sold at auction, and the plaintiff being the highest bidder, the crier said to the slave "there is your master," and the vendor being present did not object, but entered the plaintiff's name and bid in the account of sales, and gave him time to comply with the terms, but afterwards sold the slave to the defendant, *it was held* that no title vested in the plaintiff, so as to enable him to recover in detinue. *Ibid.*

11. Where, in a contest about the sale and delivery of a slave, it is doubtful from the evidence, whether the delivery which was made was for the purpose of transferring the property to the vendee, or merely that he should hold as bailee until a sale should be effected by means of a bill of sale, the question should be submitted to the jury as one of fact for their determination. *Caldwell v. Smith*, 4 Dev. and Bat., 64.

12. The act of 1792 applies to a sale between vendor and vendee, although no third person is concerned as creditor or purchaser. *Ibid.* (See Rev. Code, ch. 37, sec. 19.)

13. A parol sale and delivery of a slave, made by the tenant for life and remainderman, is valid; for the act of 1784 does not prevent a parol conveyance of slaves from being good between the parties thereto; but if it did, the act of 1792 declares *bona fide* sales of slaves accompanied by delivery good, without a bill of sale, and the act of 1819 to avoid contracts for the sale of land and slaves does not affect the question, as that act applies to executory contracts only, and not to contracts executed. *White v. White*, 4 Dev. and Bat., 427. (See Rev. Code, ch. 37, sec. 19, and ch. 50, secs. 11 and 13.)

14. A sale of a chattel at the common law vested a title in the purchaser without a delivery. And so it was as to the sale of a slave between the parties, under the acts of 1784 and 1792, as those statutes only affected the rights of creditors. Whether the revision of those statutes, in omitting the preambles, may not have altered the construction, *quære*. *Woods v. Fuller*, 5 Ired., 26. (See Rev. Code, ch. 37, sec. 19.)

15. Where A, in consideration of \$200 paid to him by B, delivered to B certain slaves to be held in trust for the use of A's wife from whom he had separated, and A afterwards became reconciled to his wife and brought an action at law to recover the slaves, *it was held* that A could not maintain the action, because, by the payment of the consideration and the delivery of the slaves, the legal title had vested in B. *Huntley v. Ratliff*, 5 Ired., 542.

16. In trover for a slave, it appeared that the plaintiff had had possession of the slave for more than three years, and that at the time she took possession she executed to the owner an obligation with the following condition: "that whereas the said M. H.

S. hath this day received of said H. a negro girl named Nell, which the said S. is to have the entire service and peaceable possession of during her natural life for the sum of \$350 to him in hand paid by the said S.; now if the said S. shall keep the said negro and her issue (if any) in the county and State aforesaid and sufficiently clothe and feed them and humanely treat them during their time of service, and the said S., or her executors, shall, before, or at her death, return the said negro or negroes to the said H.," *it was held* that the plaintiff had a clear title to the said slave, both under her purchase and by force of the statute of limitations. *Smith v. Davis*, 8 Ired., 508.

17. The title to a slave can only be conveyed by a sale in writing, except when delivery accompanies the sale, or by a gift evidenced by a written instrument, the written instrument in each case to be attested by a subscribing witness, proved and recorded. *West v. Tilghman*, 9 Ired., 163.

18. Where there is a contract for the sale of a slave, and the question was, whether it was the intention of the parties that the contract should be considered executed or only executory, the court cannot decide that question but must leave it to the jury. *Featherston v. Featherston*, 11 Ired., 317.

19. One who has only a verbal authority to sell a slave can transfer the title by sale and actual delivery. *Osborne v. Horner*, 11 Ired., 359.

20. No technical words are necessary in a bill of sale or deed of gift for slaves; and *it was held*, therefore, that in a deed of gift, words appointing "H. agent" of certain slaves, "to the use of C," constituted a valid gift to H. as trustee for C. *Cobb v. Hines*, Busb., 350.

21. It makes no difference whether the witness to a bill of sale for a slave subscribes his name at the time of the execution of the deed, or subsequently, provided it is done *bona fide*, and before the rights of third parties have attached. And the question of *bona fides* must be submitted to the jury. *Benton v. Sanders*, Busb., 360.

22. A made an assignment by deed of certain slaves to B upon a trust to sell and pay certain debts, and by the deed A was to retain possession, but not to sell without the consent of B; and upon the payment of all the debts by A, the assignment was to be void. A gave notice to B of his intention to sell one of the slaves, to which B neither declared his assent or disagreement, and afterwards A sold in the absence of B; and *it was held* that the sale passed no title as against B, though it might have been otherwise had B been present; and *it was held* further, that an endorsement upon the deed, *after* the sale, of the payment of the last debt secured thereby, afforded no evidence in support of the sale. *Smith v. Chitwood*, Busb., 445.

23. It is not necessary that a bill of sale for slaves should

be executed by the grantee. Hence, where a deed, conveying slaves upon certain trusts, was duly executed by a woman and her intended husband in contemplation of marriage, and was duly proved and recorded, *it was held* to be valid, although the draftsman added an extra seal, intended for the signature of the trustee, which was not signed by him. *McLean v. Nelson*, 1 Jones, 396.

24. Where an administratrix who had been appointed in Virginia where her husband died intestate, and where by law she was entitled to one-third of his slaves, removed into this state, and by an agreement with the next of kin, who were her children, took an absolute interest in a child's part of the slaves which she kept, and delivered over the residue to her children, *it was held* that her title to the slaves which, under the agreement, she had retained, was good and perfect without writing. *Reeves v. Edwards*, 2 Jones, 457.

25. When a slave is sold the title upon the payment of the price will pass by the delivery, unless the parties intend that the contract of sale shall not be complete until a bill of sale is executed, in which case the title will not pass until that is done. *Morris v. Rippy*, 4 Jones, 533.

26. Where a father gave to his children, by parol, certain slaves acquired by his marriage with their mother, and was present at a division of the slaves among them, upon which one of the children who had a more valuable share paid money to the others who had less valuable ones, *it was held* that the payment of money by one child to another did not make a sale and delivery by the father to any one of the children, and that as to him it was a mere parol gift, and, therefore, void under the act of 1806. *Cox v. Humphrey*, 6 Jones, 405.

27. Where a vendor of a slave executed a paper writing, acknowledging the receipt of a certain sum expressed to be in part payment of the price, and binding himself, under a penalty, to deliver the slave, who was then a runaway, by a certain day, *it was held* that this was not evidence of an executed contract of sale, by which the property vested in the vendee. *Brown v. Brooks*, 7 Jones, 93.

28. A deed of trust conveying slaves for the payment of debts, with the usual power to make sale, but not having a subscribing witness, is, according to the Rev. Code, ch. 50, sec. 13, inoperative and void. *Eure v. Parker*, 7 Jones, 424.

29. Where a parol agreement was made between A and B for the exchange of slaves, and A's slave went immediately into the possession of B, but the slave of the latter being runaway, it was agreed that A should take him into possession at his risk whenever he could do so, *it was held* that on A's afterwards taking possession of the runaway slave, the title to him passed to A; and *it was further held* that it made no difference that the contract

on the part of B was made by an attorney appointed as such by parol. *Bailey v. Moore*, 1 Winst., 86.

30. A being the owner of a female slave, and her husband, they both being very old and about to leave the country, gave the house and lot on which the slaves lived to B, and gave him at the same time a note for \$50, in consideration that he would support the slaves for their lives, *it was held* that the transaction amounted in law to a sale of the slaves so as to transfer the title to B. *State v. Duckworth*, 1 Winst., 243.

See (Contracts—Contracts as affected by the statute of frauds, 2.) (Deed—Of the execution and date of a deed, 22.) (Registration, 2-3-4-6-21-28-30-31-38.)

IV. INCREASE OF SLAVES.

1. The increase of a female slave will not belong to the tenant for life of the mother, but to the ulterior owner. *Timms v. Potter*, Mar. 22, (8,) S. C. 1 Hay., 234, (268,) S. P. *Glasgow v. Flowers*, 1 Hay., 233, (267,) *Erwin v. Kilpatrick*, 3 Hawks, 456.

V. OF A MASTER'S LIABILITY FOR THE CONTRACTS OR ACTS OF HIS SLAVES.

1. A master cannot be made liable for work done for, or money lent to, his slave. *Tilly v. Norris*, 4 Ired., 229.

2. A general license by the master to his slave to make bargains for work to be done only for the benefit of the slave, or a license for the slave to borrow money on his own account, will not render the master a debtor to a person, who should be so inconsiderate as to run up an account with a slave thus licensed. *Ibid.*

3. A master is not responsible for a trespass committed by his slave, unless he ordered it, or subsequently sanctioned it. *Parham v. Blackwelder*, 8 Ired., 446.

4. Where slaves working in a new ground set fire to a log heap in very dry weather, within five yards of a fence, a dead pine tree and dry trash being between the log pile and the fence, by which fire was communicated to timber and a house on an adjoining tract, *it was held* to be negligence for which the master of the slaves was liable in case, although it was calm in the morning when the log pile was set on fire. *Garrett v. Freeman*, 5 Jones, 78.

See (Trespass—To persons and personal property, when it will lie, 6-28.)

VI. OF OFFENCES AGAINST THE PERSONS OF SLAVES.

1. The killing of a slave is an offence indictable at common law. *State v. Reed*, 2 Hawks, 454.

2. A battery committed on a slave without justification or ex-

cuse is an indictable offence; but there are circumstances which would justify or excuse a battery on a slave, which would not have that effect in the case of a battery on a white man. *State v. Hale*, 2 Hawks, 582.

3. A master is not liable to be indicted for a battery committed by him on his slave; nor is the hirer of a slave liable to be indicted for a battery committed on the slave during the time of the hiring; but this rule does not prevent the owner from recovering damages in a civil action, for any injury the slave may sustain by such battery. *State v. Mann*, 2 Dev. 263.

4. If death unhappily ensue from a master's chastisement of his slave, inflicted apparently with good intent for his reformation or example, and with no purpose to take life or to put it in jeopardy, the law would doubtless tenderly regard every circumstance, which, judging from the conduct generally of masters towards slaves, might reasonably be supposed to have hurried the party into excess. But where the punishment is barbarously immoderate and unreasonable in the measure, the continuance and the instruments, accompanied by other hard usage, and painful privations of food, clothing and rest, it loses all character of correction *in foro domestico*, and denotes plainly that the master must have contemplated a fatal termination to his barbarous cruelties; and in such case, if death ensue, he is guilty of murder. *State v. Hoover*, 4 Dev. and Bat., 365.

5. A master may lawfully punish his slave, and the degree must, in general, be left to his own judgment and humanity, and cannot be judicially questioned. But the master's authority is not altogether unlimited. He must not kill; for, independently of the act of 1791, the killing a slave may amount to murder, and the rule includes a killing by the master, as well as that by a stranger. But it must be true, in the nature of things, that a killing by the owner may be extenuated by many circumstances, from which no palliation could be derived in favor of a stranger. *Ibid.*

6. If a white man wantonly inflicts upon a slave, over whom he has no authority, a severe blow or repeated blows, under unusual circumstances, and the slave, *at the instant*, strikes and kills, without evincing by the means used great wickedness or cruelty, he is only guilty of manslaughter, giving due weight to motives of policy and the necessity for subordination. The same principle of extenuation applies to the case of the beaten slave's comrade or friend, who is present and instantly kills the assailant, without, in like manner, evincing by the means used great wickedness or cruelty. *State v. Caesar*, 9 Ired., 391.

7. If a master, in correcting a slave for a slight offence, kill him by the cruel use of deadly weapons, he will be guilty of murder. *State v. Robbins*, 3 Jones, 249.

VII. OF OFFENCES BY SLAVES.

1. Slaves are not liable to be punished with death, in any case where a free man would not be subject to the same punishment, except by virtue of the act concerning conspiracy by slaves. *State v. Sue*, Conf. Rep., 54, (189.) (For what offences slaves are now punishable with death, for which a white man would not be; see Rev. Code, ch. 107, secs. 35, 36, 40 and 44.)

2. In 1815, the punishment of horse stealing by a slave was whipping and the loss of ears for the first offence, and death for the second, under the act of 1741, the subsequent act prescribing punishment for horse stealing not extending to slaves. *State v. Levin*, 2 Car. L. R., 270, (250.)

3. Notwithstanding the act of 1741, a slave tried for a capital crime may be convicted by the testimony of a slave, though uncorroborated by *pregnant circumstances*. *State v. Ben*, 1 Hawks, 434. (For the manner in which slaves are now to be tried for felonies; see Rev. Code, ch. 107, sec. 34.)

4. The act of 1741 punished an act committed by a slave with whipping and the loss of ears for the first offence and death for the second, on an indictment in the county court. The act of 1816 gave to the superior court jurisdiction of all offences, the punishment whereof extended to loss of life, and gave to slaves the same benefit of clergy as to freemen. *Held* that this did not give the superior court jurisdiction of the offence named in the act of 1741, though it might have been the second offence. *State v. Adam*, 3 Hawks, 188.

5. The act of 1794, relative to slaves hiring their own time, had two objects in view, first, to fine the owner, and, secondly, to abate the nuisance, if it be yet continuing, or, if it be at an end, to pursue the slave and have him hired out. The necessity of proceeding by presentment under this act is done away with by the act of 1797. *State v. Woodman*, 3 Hawks, 384. (See Rev. Code, ch. 107, sec. 28 and ch. 35, sec. 6.)

6. The county courts alone can have original cognizance of a common law grand larceny committed by a slave. If, therefore, a slave, who has once had his clergy, be indicted in the superior court for a grand larceny at common law, the indictment should state that it was the second offence, so as incur the punishment of death, and that the court might see upon the record that it had jurisdiction. *State v. Allen*, 3 Hawks, 614, S. P. *State v. Daniel*, *Ibid*, 617. (The benefit of clergy is abolished, Rev. Code, ch. 34, sec. 22. As to the cognizance of offences committed by slaves, see Rev. Code, ch. 107, secs. 31, 32, 33 and 34.)

7. If a slave in defence of his life, and under circumstances strongly calculated to excite his passions of terror and resentment, kills his overseer (or, *it seems*, his master or hirer) the

homicide will be but manslaughter. *State v. Will*, 1 Dev. and Bat. 121.

8. Unconditional submission is the general duty of the slave. Unlimited power is in general the legal right of the master. But this does not authorize the master to kill his slave, and the slave has a right to defend his life against the unlawful attempt of the master to take it. If, however, the slave resists his master, previous to any attempt on the part of the latter to take his life, and he afterwards kills his master, he is guilty of murder. *Ibid.*

9. An indictment upon the act of 1823, making an assault by a person of color upon a white female, with intent to commit a rape, capital, must charge the assault to have been felonious. Charging an assault with intent "feloniously to ravish" is not sufficient. *State v. Jesse*, 2 Dev. and Bat., 297. (See Rev. Code, ch. 107, sec. 44.)

10. The great distinction between homicide committed with malice, and that committed in a transport of passion suddenly excited by a grievous provocation, is as steadily to be kept in view in the trial of a slave charged with the murder of a white man, as in that of a white man charged with the murder of his equal, or of a slave. But the same matters which would be deemed in law a *sufficient provocation* to free a white man, who has committed a homicide in a moment of passion, from the guilt of murder, will not have the same effect when the person slain is a white man, and the offender a slave; for though among equals the general rule is, that words are not, but blows are, a sufficient provocation, yet there *may be* words of reproach so aggravating when uttered by a slave, as to excite in a white man the temporary fury which negatives the charge of malice; and this rule holds without regard to the merit or demerit of the white man. *State v. Jarrott*, 1 Ired., 76.

11. The insolence of a slave will justify a white man in giving him moderate chastisement with an ordinary instrument of correction, at the moment when the insolent language is used; but it will not authorize an excessive battery, as with a dangerous weapon, nor will it justify an attack upon the slave for even moderate correction, if the insolence be past at the time. *Ibid.*

12. The rule, that where parties become suddenly heated and engage immediately in mortal conflict, fighting upon equal terms, and one kills the other, the homicide is mitigated to manslaughter, applies only to equals, and not to the case of a white man and slave, if the slave kill the white man while fighting under such circumstances. *Ibid.*

13. An ordinary assault and battery, committed by a white man upon a slave, will not be a sufficient provocation to mitigate a homicide of the former by the latter from murder to manslaughter; but a battery which endangers the slave's life will be a sufficient provocation to produce that result. In the cases be-

tween these extremes, that is a legal provocation, of which it can be pronounced, having due regard to the relative condition of the white man and the slave, and the obligation of the latter to conform his instincts and his passions to his condition of inferiority, that it would provoke well disposed slaves into a violent passion. *Ibid.*

14. An indictment, charging that a certain negro slave did "hire her own time contrary to the form of the statute, &c.," is defective and must be quashed, because it omits to charge one essential part of the offence, that is, that she was permitted by her master to go at large. *State v. Clarissa*, 5 Ired., 221. (See Rev. Code, ch. 107, sec. 28.)

16. Presentment and indictment are considered in construing the 31st sec. of the 111th chap. of the Rev. Stat. as the same. *Ibid.* (In the 28th sec. of the 107 ch. of the Rev. Code, the phraseology is so altered as to prevent this question from arising.)

17. A slave is not indictable in the superior court under 31st section of the 111th chapter of the Revised Statutes. *State v. Nat*, 13 Ired., 154. (But see Rev. Code, ch. 107, sec. 28.)

17. Under the 41st section of the 111th chapter of the Revised Statutes, the justice before whom a slave is brought, charged with an offence not capital, must decide whether the offence is of such a nature as to require a greater punishment than he is authorized to inflict, and he shall give judgment accordingly. And, in such a case, an appeal is allowed by the act of 1842, ch. 9, sec. 1, to the court, which may decide without a trial by jury. No appeal from the county to the superior court is authorized by law. *State v. Bill*, 13 Ired., 373. (See Rev. Code, ch. 107, secs. 32 and 33.)

18. The act of 1819, Rev. Stat., ch. 34, sec. 60, forbidding "any person" from passing counterfeit bank bills, &c., does not embrace slaves. *State v. Tom*, Busb., 214. (See Rev. Code, ch. 34, sec. 61.)

19. Under the acts, Rev. Code, ch. 34, sec. 26 and ch. 107, secs. 31, 32 and 33, the jurisdiction of grand larceny committed by a slave is taken away from the superior court and is vested in a single justice. *State v. Harriet*, 4 Jones, 264.

20. Where a female slave was in the act of resisting the lawful authority of her master, and another slave, her husband, approached with the intention of aiding by violence his wife, and heedless of consequences did give such aid as made it necessary for the master to turn his force upon him, which gave his wife an opportunity to strike and kill the master, *it was held* that both were guilty of murder. *State v. Davis*, 4 Jones, 353.

21. There is no analogy to be drawn from the case of a free person committing a homicide and that a slave killing his master. *Ibid.*

22. In a proceeding against a slave for carrying arms, under

the act of 1854, Rev. Code, ch. 107, sec. 26, it is no defence that the master put the arms in the hands of his slave; for the master is prohibited from doing so for any purpose. *State v. Hannibal*, 6 Jones, 57.

23. In such a proceeding the master has a right to appeal from the judgment of the justice. *Ibid.*

24. The master, in such a proceeding, is not liable to a fine under the act, and the justice cannot give a judgment for one against him. *Ibid.*

25. Where a negro slave made an assault upon a white woman with an intent to ravish her, and afterwards changed his purpose and desisted, *it was held* that he was, nevertheless, guilty under the statute, Rev. Code, ch. 107, sec. 44. *State v. Elick*, 7 Jones, 68.

26. The word "person" in the Rev. Code, ch. 34, sec. 5, which prescribes the punishment of rape, includes slaves, as well as free persons of color and white men. *State v. Peter*, 8 Jones, 19.

See (Slaves—Of offences against the person of slaves, 6.) (Evidence—In criminal proceedings and indictments, 38–39.)

VIII. OF THE HARBORING OF SLAVES.

1. The act of 1791, which gives a penalty for harboring and maintaining slaves, means a secret and fraudulent harboring. If the defendant openly maintain the slaves claimed by the plaintiff, giving notice that he shall keep them until recovered by law, he is not liable for the penalty. *Dork v. Marsh*, 2 Car. L. R., 249, (228.) S. P., *Thomas v. Alexander*, 2 Dev. and Bat., 385. (See Rev. Code, ch. 34, sec. 81.)

2. Harboring or maintaining a runaway slave, within the act of 1741, consists in secretly aiding him, by any means, to continue absent from his master, knowing, at the time that he was rendering such aid, that the slave was a runaway. *State v. Hathaway*, 3 Dev. and Bat., 125.

3. To constitute the offence of harboring a runaway slave, it is not necessary that, at the time of first receiving the slave, the defendant conceived the purpose of fraudulently harboring him, if his acts afterwards showed that he then had such a purpose. *State v. Burk*, 4 Jones, 7.

4. To subject a person to an action under the act, Rev. Code, ch. 34, sec. 81, for harboring a runaway slave, the act must be done secretly as well as fraudulently. *Young v. McDaniel*, 5 Jones, 103.

IX. OF OFFENCES IN THE TREATMENT OF, OR DEALING WITH, SLAVES.

See (Indictment—In what cases an indictment will lie, 26–34–40–42–55–56–60–61–62–78–81–85–87–90–91–96–97–107–108.) (Indictment—Form and matters relating thereto, 19–20–28–32–

73-80-81--87-89-93-94.-123-125-137--142-143--164.) (Indictment—Of the trial, verdict and judgment, 39-40-85-110.) (Indictment—Variance between the allegation and proof, 2.)

SOLDIER.

See (Conscription.) (Enlistment.) (Habeas corpus, 8-9.)

STATUTE.

See (Act of Assembly,) (Penal Statutes.)

SUNDAY.

See (Action on the case—For deceit, 39.) (Indictment—When an indictment will lie, 58-71.) (Indictment—Form and matters relating thereto, 29.) (Execution—Levy, sale and application of the money raised, 54.)

SURETY AND PRINCIPAL.

1. One surety cannot recover from his co-surety at law. *Robinson v. Kenon*, 2 Hay., 181, (379.) *S. P. Carrington v. Carson*, Conf. Rep., 216, (323.) (This is altered by statute; see Rev. Code, ch. 110, sec. 2.)

2. After a bond has been discharged by the principal debtor, it cannot be set up again to the prejudice of the surety, by a subsequent agreement between the principal and the obligee. *Woodman v. Mooring*, 3 Dev., 237.

3. To enable a surety to recover money paid to the use of his principal, he must prove an actual payment in satisfaction of the

debt: therefore, a judgment against the surety will not entitle him to an action until it has been satisfied. *Hodges v. Armstrong*, 3 Dev., 253.

4. In order to get the benefit of the security upon the payment of the debt, the surety must have it assigned to a trustee; or, if bound collaterally, he may take the assignment directly to himself. Hence, if the creditor do any act, which puts it out of his power to make an assignment to the surety, the latter is discharged. *Ibid.*

5. When an assignment of the security is taken, the surety may have his redress upon it immediately in the name of the creditor. But while it is in force, the surety cannot maintain an action against the principal for the money paid for the assignment. *Ibid.*

6. Where a surety in a joint note paid it, but took no assignment from the creditor of a judgment previously obtained upon it against the principal debtor, *it was held* that the payment satisfied the judgment. *Sherwood v. Collier*, 3 Dev., 380.

7. An assignment of a security as of a note, &c., to one of the parties to it, is a satisfaction; if it be intended to keep it on foot for the benefit of the surety, the assignment should be to a stranger. *Ibid.*

8. Where two persons engage in one common risk, as sureties for a third, and one of them subsequently takes an indemnity from the principal debtor, such indemnity enures to the benefit of all the sureties. *Fagan v. Jacocks*, 4 Dev., 263.

9. A surety, who pays money for his principal, has a complete cause of action against his co-surety from the time of such payment, and from that time, therefore, the statute of limitations begins to run; but before the commencement of his suit, he must give notice to his co-surety of the payment of the money. *Sherrod v. Woodard*, 4 Dev., 360.

10. One, who is a surety by bond, though his character is stated in the instrument, cannot avail himself of *laches* by the creditor, at law at least, if he can in equity; for *laches* is neither performance, nor a release, and all the obligors are bound alike. *State Bank v. Locke*, 4 Dev., 529.

11. The obligation of a bond for the forthcoming of property is only that the property shall be delivered to the officer at the time designated, and not that the execution shall be satisfied; and, therefore, if a surety to a forthcoming bond, before it is forfeited, discharges the execution, without the request of his principal, such surety cannot maintain an action against his principal for money expended for the latter's use, although, by the payment of the money in satisfaction of the execution, the bond was discharged. *Gray v. Bowles*, 1 Dev. and Bat., 437.

12. A surety, whose obligation to pay has become absolute by the default of his principal, may pay to the extent of his liabil-

ity without suit, and the money so paid will be regarded as expended for the use, and at the expense of his principal. *Ibid.*

13. An administrator, who is surety to a debt of his intestate, by giving his own bond in lieu of that of his intestate, and taking up the latter, intends *prima facie* a payment of the debt, and not a continuance of it. *Vanhook v. Williams*, 2 Dev. and Bat., 260.

14. The endorser of a single bill for the accomodation of the principal obligor is not, without a special contract to that effect, liable to contribute as a co-surety with one who signed the bill as a co-obligor with the principal. The endorser, in such a case, is to be taken only as a supplemental surety, and not liable to be called on for contribution by the primary surety. *Dawson v. Petway*, 4 Dev. and Bat., 396.

15. If, in such a case, the bill were given to renew a former one in which the present endorser was a co-obligor, that circumstance might perhaps be evidence to the jury that the form last adopted was accidental only, and that *in fact* there had been an agreement of common and mutual liability between those who gave their names to the principal debtor. *Ibid.*

16. Where a party signs a note as surety of another, and then a third person also affixes his name as a maker, adding to his signature "surety to the above," the first surety cannot, upon paying the note, compel contribution against the second surety, unless it is made satisfactorily to appear, that the second surety intended to place himself in the relation of a co-surety with the first. *Thompson v. Sanders*, 4 Dev. and Bat., 404.

17. It is not necessary, to enable one co-surety to have contribution from another, that the former should pay the debt under the compulsion of a suit. *Linn v. McClelland*, 4 Dev. and Bat., 458.

18. A previous suit for the same cause of action, in which the plaintiff has been non-suited, is both a notice and a demand of his claim. *Ibid.*

19. *It seems* that a surety who has paid the debt of his principal, upon the default of the latter, may recover of his co-surety, though the principal was solvent when the surety paid the money, provided the principal subsequently became insolvent before the surety received payment, or had a reasonable time to prosecute a suit against him to judgment. Such surety certainly may recover where the insolvency of the principal existed from the day the money was paid to that on which the suit was brought against the co-surety. *Ibid.*

20. The contract between principal and surety, though it may be inferred from the nature of the security given to the creditor, is not contained therein, nor evidenced thereby, but is a collateral contract, usually a parol one, which therefore may be

proved by any competent and satisfactory evidence. *Wharton v. Woodburn*, 4 Dev. and Bat., 507.

21. If two persons be bound by a bond or judgment for the payment of a sum of money, the one is liable at law to the creditor in the same manner and to the same extent as the other, although as between themselves they stand as principal and surety. *Shaw v. McFarlane*, 1 Ired., 216.

22. An agreement for indulgence to the principal does not at law amount to satisfaction of the debt; and nothing *in pais* can discharge an obligation or a judgment but performance or satisfaction. *Ibid.*

23. Where a surety brings an action of assumpsit for money paid for the use and at the request of the defendant, against his co-surety, to obtain contribution, it is not sufficient for him to show that he has given his note for the debt due by the principal, and that the same has been accepted by the creditor as a payment and discharge of the debt. He must prove, to entitle him to recover, an actual payment in money; or in money's worth, such as bank notes, the note of a third person, or a horse, or the like, which is valuable in itself to the surety who parts with it. *Brisendine v. Martin*, 1 Ired., 286.

24. One surety cannot sustain an action against his co-surety for money paid for the principal, unless he has actually paid the money, or what is equivalent thereto. Even a note, given by an agent of the surety in the agent's own name, will not support the action, although that note was received by the creditor in satisfaction of his demand. *Nowland v. Martin*, 1 Ired., 307.

25. In all cases of joint obligations, &c., suit may be brought against the whole, or one or more of the persons making such contract. Therefore, where one was sued alone on a joint obligation, and the jury found upon the plea of the defendant that he was only a surety, the plea and verdict were both immaterial, and the defendant could not avail himself of the benefit of the act relating to judgments against a principal and surety; and in such a case an indorsement on the execution, according to the provisions of the act, is absurd and unmeaning. *Davis v. Sanderlin*, 1 Ired., 389. (See Rev. Code, ch. 31, secs. 124 and 125.)

26. In equity, relief is granted between co-sureties upon the principle of equality applicable to a common risk; and upon the insolvency of one, the loss is divided between the others, as being necessary to an equality. But in a court of law each surety is responsible to his co-surety for an aliquot proportion of the money for which they were bound, ascertained by the number of sureties merely, without regard to the insolvency of any one or more of the co-sureties. *Powell v. Matthis*, 4 Ired., 83.

27. This rule of the common law, as held in England, is not altered by our act of 1807, by which it is provided, that, where the principal is insolvent, one surety who has paid the debt

may have his action on the case against another "for a just and ratable proportion of that sum." *Ibid.* (See Rev. Code, ch. 110, sec. 2.)

28. Where there are more than two sureties and one pays the whole debt, the principal being insolvent, he cannot bring his action against his co-sureties jointly, but each must be sued separately for his own liability. *Ibid.*

29. A constable is not bound to levy an execution on the property of the principal, in preference to that of the surety, unless the magistrate has declared in his judgment which is surety and has endorsed it on the execution; and he is not bound to make such discrimination except upon the application of, and due proof by, the surety. *Stewart v. Ray*, 4 Ired., 269.

30. In a court of law, each surety is responsible for his co-surety for an aliquot proportion of the money for which they were bound, ascertained by the number of sureties merely, without regard to the insolvency of one or more of the co-sureties. In a court of equity the rule is different. *Samuel v. Zachary*, 4 Ired., 577.

31. Where A, who is an endorser of the note of B due to a bank, borrows money from the same bank on his own note with surety, and pays therewith the note of B after it has become due, *it was held* that A, before paying up his own note in bank, can sustain an action against B for money paid as his surety. *Hall v. Whitaker*, 7 Ired., 353.

32. The act of 1807, giving a right to one surety to recover at law his ratable proportion of the debt of the principal, does not enlarge the rights of the surety who pays the debt, nor deprive the co-surety of any just grounds of defence, which would have been before available to him in equity. The only exception is, that, from the necessity of the case, the court of law cannot take cognizance of the complicated case of one or more of the sureties at law, when they exceed two, but that it restricts the recovery to an aliquot part of the debt, according to the number of the sureties. *Hall v. Robinson*, 8 Ired., 56. (See Rev. Code, ch. 110, sec. 2.)

33. When two or more embark in the common risk of being sureties for another, and one of them subsequently obtains an indemnity from the principal, or a county security to any extent, it enures to the benefit of all. *Ibid.*

34. Where A, a surety for B, received from B his, A's, debt, and A was to pay to B a debt to which A was surety, and afterwards it being discovered that A was surety for other debts of B, and it was then agreed that A should pay those other debts as well as the first, *pro rata* in proportion to the debt he had owed B, and C, being a co-surety with A in the first debt, also received a certain sum from B in discharge of his liability, and A had to discharge the whole of the first debt, *it was held* that

A was entitled to recover from C the sum so received by him from B. *Ibid.*

35. An indemnity obtained from a principal by one of two co-sureties, after the risk is incurred, enures equally to the benefit of both. But where the surety merely had a deed in trust for certain property, as an indemnity, executed by the principal, and neglected to have it registered, so that the property was sold by other creditors, the co-surety is not entitled, on account of this *laches*, to make him responsible for the value of the property. *Pool v. Williams*, 8 Ired., 286.

35. A surety, who seeks to recover from a co-surety a ratable part of money paid, must take care not to do any act which will prevent the co-surety from having recourse against the principal. If, therefore, he release the principal, it is a discharge of the co-surety. *Draughan v. Bunting*, 9 Ired., 10.

37. A surety, who has paid money for his principal, cannot sue him in an action of *tort*. *Ledbetter v. Forney*, 11 Ired., 294.

38. A surety has no claim upon his principal, until he has paid the money for which he was bound. *Ponder v. Carter*, 12 Ired., 242.

39. The act, Rev. Stat., ch. 113, sec. 4, which confers on the claim of a surety, paying the debt for which he is surety, the dignity, in the administration of the assets of the principal, which the debt, if unpaid, would have had, applies to any such claim, whether the payment be made before or after the death of the principal. *Drake v. Coltraine*, Busb., 300. (See Rev. Code, ch. 110, sec. 4.)

40. A surety in an official bond cannot, as relator, bring an action at law against his co-sureties for a default of the principal; and the objection may be taken under the plea of the general issue. *State v. Beam*, Busb., 318.

41. Where the surety to a note in a bank has a new note, with other sureties, discounted, and by a means of a check has the proceeds of the latter note applied to the former, it is a good payment of the first note, and makes the surety the creditor of his principal before the new note is paid off. *Brooks v. King*, 1 Jones, 45.

42. A surety, who has paid money for his principal, is not required to give notice to his principal, as he would be to a co-surety, before bringing suit for the money so paid. *Sikes v. Quick*, 7 Jones, 19.

See (Evidence—Books of original entries, accounts, receipts, &c., 12.) (Executors and Administrators—Of their liability to creditors, &c., 94.) (Bankrupt, 18.)

SURRENDER.

1. Before the statute of frauds, a term of years, whether by deed or parol, might have been surrendered wholly by parol. *Gwyn v. Wellborn*, 1 Dev. and Bat., 313.

2. Surrenders are favored in law. They require no technical words, but only such as express the intention to yield up. *Ibid.*

TAXES.

1. Where taxes on land were due for 1795 and 1796, and the sheriff sold it for the taxes of 1795, for a sum sufficient to pay the taxes for that year, but not for the year 1796 also, *held* that the land was liable in the hands of the purchaser for the taxes of the latter year. *State v. Cole*, Conf. Rep., 93, (224.)

2. The purchaser of land sold for taxes is not bound to show that the sheriff advertised the land agreeably to law. *Stanly v. Smith*, 1 Car. L. R., 511, (124.)

3. A billiard table erected and used merely for the purpose of amusement was *held* liable to the tax on "billiard tables," in the same way as if used for the purposes of gaming. *Sears v. West*, 1 Murph., 291. (Public and private billiard tables are now taxed separately; see act of 1858, ch. 25, sec. 82, no. 9.)

4. A purchaser of land sold for taxes is only bound to show, in support of his title, the sheriff's deed for the land sold, that the title is out of the State, and that the taxes were due. The other matters required by law from the sheriff in relation to the sale of land by him for taxes are only directory to him, and do not affect a *bona fide* purchaser. *Martin v. Lucey*, 1 Murph., 311.

5. A justice of the peace, appointed to receive the lists of taxable property, has no right to add to the list any article of taxable property not returned by the owner. *Toris v. Justices of Rowan*, 2 Murph., 167. (For the present revenue law, see acts of 1858, ch. 25, and 1860, ch. 32.)

6. When the sheriff sells an entire tract of land for taxes on the whole, when no tax is due for one third part, the sale is void. *Jones v. Gibson*, N. C. Term, R., 41, (480.)

7. When a person makes pig iron at his own furnace, which he works into bar iron at his own forge, the article was liable, under the act of Congress of 1815 while it was in force, for a distinct duty in each stage of its manufacture. The exemption of articles for the maker's own use meant for his own consumption. *Frew v. Graham*, N. C. Term R., 176, (609.)

8. The defendant obtained a license to distil under the act of Congress of July, 1813. After the passage of the act of December, 1814, laying a duty of twenty cents a gallon on spirits distilled, he failed to give notice to the collector of the internal revenue of his intention to desist from distilling, under his license, after the 1st February, 1815. *It was held* that by this neglect he became liable to pay the duties laid by both acts. *United States v. Whitmell*, 3 Murph., 137.

9. A lot in a town belonging to an incorporated academy in the town, but not adjoining it, nor used with it for the purposes of the instruction or recreation of the students, was held not to be exempt from taxes under the act of 1806. *Stewart v. Daves*, 3 Murph., 244. (See revenue act of 1858, ch. 25, sec. 25.)

10. Where lands were sold for taxes under the act of 1798, if no person bid off a smaller quantity than the whole, the bid was considered as made by the governor for the use of the State, but the title of the State was not completed, before all the further requisites mentioned in the act were complied with. *Register v. Bryan*, 2 Hawks, 17.

11. A sale of land by the marshall for taxes, after a legal tender to him, by a part owner, of all that was due, vests no title in the purchaser. *Franklin v. Ferrell*, 3 Hawks, 283.

12. By the act of 1819, the sheriff who is in office the first day of April in each year, is bound for the taxes collectable during that year, although his term may expire before they can be collected. Therefore, where a sheriff was elected after the 1st day of April and resigned in February following, he was held not to be liable for the collection of any taxes. *Lenoir v. Wellborn*, 1 Dev., 451.

13. A sheriff who was elected in January, 1820, and to whom before the first day of April ensuing the tax lists of 1819 were delivered, is bound for their collection. *Dickey v. Alley*, 1 Dev., 453.

14. If a sheriff be elected after the first day of April, and voluntarily receive from his predecessor the tax lists then collectable, it is a question whether he is bound to collect them. *Ibid.*

15. It is the duty of the clerk of the county court to publish the lists of taxables and insolvents, in the mode prescribed by the act of 1786, in the condition in which they are returned to him, notwithstanding they may be incomplete. *Rhodes v. Buie* 2 Dev., 524.

16. The act of 1786 is not repealed by the acts of 1814 and 1817, authorizing the county courts to assess county and poor taxes. *Ibid.*

17. A sheriff who was elected in June, 1826, and went out of office in June, 1827, is bound to collect and account for the taxes due in October, 1827, although the tax lists were not handed to

him until after his office had expired. *State v. Governor*, 3 Dev., 365.

18. Where the sheriff sells lands for the taxes of two years when he had a right to collect only those due for the last year, the sale is void, and his deed vests no title in the purchaser. *Douglass v. Short*, 3 Dev., 432. S. P., *Avery v. Rose*, 4 Dev., 549.

19. The requisitions of the act of 1798, amending the revenue laws as regards the land tax, must be strictly complied with by the sheriff, or the estate of the owner is not divested; and, therefore, where land was, under the 4th section of the act, stricken off to the governor, and the sheriff, instead of executing his deed at the county court next succeeding the sale, as the act requires, did it at a subsequent term, it was held that the deed was inoperative. *Ibid.*

20. In this state sales of land for taxes are *quasi* sales under process of execution, and are governed by rules analogous to those regulating sales under *fi. fas.*; and when the sheriff has no power to sell, or where his deed shows that he has exceeded his power, no title passes to the purchaser. *Ibid.*

21. Under the act of 1822, a person who carried jewelry from county to county for sale was held liable to the tax of twenty dollars imposed upon pedlars. *Wynne v. Wright*, 1 Dev. and Bat., 19.

22. A sheriff's deed for land sold for taxes is not of itself sufficient to deprive the owner of his land; there must be further evidence that the taxes were due, for which the land was sold by the sheriff. *Love v. Gates*, 4 Dev. and Bat., 363. S. P., *Pentland v. Stewart*, 4 Dev. and Bat., 386.

23. A sale made by the sheriff of Craven county, on a distress for taxes due the town of Newbern, must, in pursuance of a private act of 1818, be made in the same manner as a sale by distress under the general law for collecting the taxes due to the State, with the exception of a few particulars which relate, for peculiar reasons, to the public revenue; and with the exception also of the mode of advertising. A sale, therefore, of an *entire* lot in the town of Newbern, for the town taxes on it, is void, and the sheriff's deed conveys no title to the purchaser. *Saunders v. McLir*, 1 Ired., 572.

24. It is essential to the validity of a sale for taxes, that the sheriff shall have returned to the county court, at its next term preceding the sale, a list of the lands on which the taxes are unpaid, and which he purposes to sell, with the names of the owners, if known, &c., as required by law. The statute is not merely directory, but so obligatory that a sale made without complying with its provisions is void. *Kelly v. Craig*, 5 Ired., 129.

25. It must appear on the record that a majority of the justices were present in the county court when the poor tax was

laid, otherwise the sureties in the sheriff's bond will not be bound for it. *Dudley v. Oliver*, 5 Ired., 227.

26. At a sale for taxes on land made after the 1st day of October of the year in which the taxes are payable, the sheriff has no authority to bid off the land in the name of the governor. *Love v. Welbourn*, 5 Ired., 344.

27. The bank of Cape Fear is subject to the payment of no public taxes, either State or county, except the payment of twenty-five cents on each share of the stock owned by individuals. *Bank of Cape Fear v. Edwards*, 5 Ired., 516.

28. Under the charter of the Bank of Cape Fear, the bank is exempted from all taxes, town as well as county and state taxes. *Bank of Cape Fear v. Deming*, 7 Ired., 55.

29. Spinning machinery, used in a factory, constitutes a part of the improvement of real estate required to be assessed for taxation under our revenue laws. *Ex parte Makepeace*, 9 Ired., 91.

30. Under the private acts of 1831 and 1835, relating to the county of Brunswick, any three or more justices sitting in court may lay the taxes. And as regards this the act of 1835 does not repeal the act of 1831. *State v. Woodside*, 9 Ired., 496.

31. In this State, land is taxed according to its fee simple value, and whoever is owner of the land for the time being is bound to pay the tax; as if an estate be limited to A for life, or ten years, remainder to B and his heirs, the valuation is assessed without reference to this division, and each must pay the tax, during the time he is the owner and enjoys the possession and pernanacy of the profits. *Willard v. Blount*, 11 Ired., 624.

32. It is otherwise in the case of landlords and tenants where rent is reserved, for the rent is in lieu of the land, and the landlord is in the pernanacy of the profits of the land; and if the tenant be compelled to pay the tax, he may recover from the landlord, or deduct the amount out of the rent. *Ibid.*

33. Under the act of 1842, ch. 36, sec. 1, the literary board can acquire no title to land alleged to be forfeited by a grantee from the State for non-payment of taxes, unless some proceeding has been first had on the part of the State, or its assignees, the president and directors of the literary fund, so as to give to the grantee, his heirs or assigns, "a day in court," an opportunity to show, that the arrearages of the taxes had in fact been paid within the year. *Phelps v. Chesson*, 12 Ired., 194. (See Rev. Code, ch. 66, sec. 19.)

34. Where contiguous tracts of land are conveyed and held by one deed as one tract, they are to be taken as one tract, though they lie in different counties and are separated by a river; and, therefore, the owner is bound to list such lands as one tract in the county in which he resides. *Hairston v. Stinson*, 13 Ired., 479.

35. The owner of taxable slaves, if he reside in this State,

must, under the act of 1846, enlist them for taxation in the county of his residence. *Green v. Allen*, Busb., 228. (The same provision is made in express terms in the revenue act of 1858, ch. 25, sec. 33.)

36. A party claiming under a sheriff's deed for land sold for taxes must show that the taxes were due. *Jordan v. Rouse*, 1 Jones, 119.

See (Constitution—Acts which have been declared constitutional, 7-9-11-21-22-25.) (Constitution—Acts which have been declared to be unconstitutional, 10.) (Constitution—Construction of various clauses of the constitution, 16.) (Ejectment—Of the title necessary to support the action, 51.) (Executors and Administrators—Of their liability to creditors, &c., 105-106-107.) (Sheriff—Authority of sheriffs and remedy for them, 2.) (Sheriff—Of the liability of sheriffs and their sureties, 11-13-18-19-29-41-43-44-49-50-51-52-53-54-55-60-70-71.)

TENANTS IN COMMON.

1. One tenant in common cannot sue another in trover. *Moye v. —*, 2 Hay., 186, (387.)

2. The privity between tenants in common is in possession only. *Walker v. Bernard*, Conf. Rep., 82, (214.)

3. An agreement by deed between two tenants in common for the partition of their land, which is sufficiently certain for each tenant to know his share, will be a bar to a petition for partition. *Moore v. Eagles*, 1 Murph., 302.

4. One tenant in common of chattels cannot maintain trover against another for the value of his moiety, upon a refusal to deliver such moiety on demand. *Campbell v. Campbell*, 2 Murph., 65.

5. If one tenant in common of lands take the whole profits thereof, the other cannot maintain case for his part. *Chambers v. Chambers*, 3 Hawks, 232.

6. Tenants in common cannot maintain trespass *quare clausum fregit* against each other, even after an attempted partition by parol. *McPherson v. Seguire*, 3 Dev. 153.

7. Where, of four sisters tenants in common, three conveyed their interest to a purchaser in fee, and the fourth joined her husband in a conveyance to the same person, but she was not privily examined, and the purchaser remained in possession of the whole tract, receiving all the rents and profits to his own use for forty years to the husband's death, and fifteen years afterwards, it was held that, admitting the deed of the *feme covert* to be color of title (a point not decided,) yet the vendee and the

feme covert were tenants in common, and his possession was not adverse to hers. *Cloud v. Webb*, 3 Dev., 317.

8. The possession of one tenant in common is the possession of the other. *Ibid.*

9. The sole enjoyment of land by one tenant in common is not of itself an ouster of his co-tenant, the possession of one being the possession of all. But the sole enjoyment for a great number of years, without claim from another having right and being under no disability, becomes evidence of title, and raises the legal presumption of an ouster. *Thomas v. Garvan*, 4 Dev., 223.

10. The sole occupation by one tenant in common of the entire property in land, without an account to, or claim by the others, is not an *ouster*, nor evidence from which an *ouster* can be inferred, unless continued for twenty years. *Cloud v. Webb*, 4 Dev., 290.

11. Where an agreement was made between A and B for the purpose of settling all controversies between them, and in which they acknowledged, among other things, that they were tenants in common of all the lands which they had purchased of C, a memorandum endorsed on the agreement by the parties, that it was not to extend to the suit of D's heirs against B and C, "and A as attorney for said heirs," cannot be understood to except from the operation of the said agreement the acknowledgment of the tenancy in common of the said lands between A and B, although the suit of D's heirs, for whom A was agent, was for the same land. *Ross v. Durham*, 4 Dev. and Bat., 54.

12. Where two persons purchase jointly from the same vendor, and enter into possession of a tract of land as tenants in common, and after a common possession of several years, execute an agreement under their hands and seals, in which they acknowledge that they hold the land as tenants in common, it cannot be permitted to either of them, or to any other person claiming under either of them, until the rights thereby acknowledged shall be divested or changed, to set that possession up as hostile to the title of his co-tenant. And in such case if one of the tenants in common convey by deed the whole land to another person, and recite in the deed that *he*, the vendor, had title to the whole, and the purchaser is ignorant of the tenancy in common, it will not prevent the rule of law from attaching. The estoppel applies to the purchaser by reason of his privacy with and under his vendor, not because of personal ill-faith. *Ibid.*

13. One tenant in common may have an action on the case against his co-tenant for any act done on the land amounting to waste or destruction, but he cannot, in any event, have an action of trespass *quare clausum fregit* against him, nor against any other person entering under his authority. *Anders v. Meredith*, 4 Dev. and Bat., 199.

14. A tenant in common has no right to inflict a battery upon

one who enters upon the land under the authority of the co-tenant; and in this respect there is no distinction between the co-tenant and one entering with him and under his authority. *Causee v. Anders*, 4 Dev. and Bat., 246.

15. One tenant in common of a chattel cannot maintain detinue for such chattel against his co-tenant. *Bonner v. Latham*, 1 Ired., 271.

16. Tenants in common, in conveying their land, need not be liable for each other in their covenant; as they may make several covenants, or in the same deed may covenant severally, each one for himself or for his share. *Grier v. Fletcher*, 1 Ired., 417.

17. When slaves are given by will to one for life and then to be equally divided between a number of persons, they may be divided by petition under the act of Assembly. *Etheridge v. Bell*, 5 Ired., 87. (See Rev. Code, ch. 82, secs. 18 and 19.)

18. When one of two tenants in common of a tract of land is in possession of the tract, and his co-tenant makes a demand for the whole tract, his refusal to comply with that demand is not to be considered as evidence of the ouster of the co-tenant; and more especially is this the case, when the demand is made by one professing to claim under the co-tenant, but of whose title the tenant in possession knows nothing. Nor, when the person so claiming enters into possession and is turned out by a writ of forcible entry and detainer, can this be considered as an ouster of the co-tenant. *Meredith v. Andres*, 7 Ired., 5.

19. Where it appeared that A raised tobacco on his mother's land and was to have one-sixth for his labor, &c., it was held that A was not a tenant in common with his mother, as to one-sixth part of the crop, and that he had no property in it or lien on it. *Cole v. Hester*, 9 Ired., 23.

20. Where a tenant in common holds over after a partition, his possession shall not be considered adverse until a demand is made by the other tenants, unless he does some act amounting to an actual exclusive possession, which could give notice that he intended to keep out all others, or some act amounting to a disclaimer of the rights of the other tenants. *Anders v. Anders*, 9 Ired., 214.

21. The law permits to each tenant in common a peaceable entry upon every portion of the land held in common, but it does not justify any actual force applied to the person of his co-tenant. *Flinn v. Anders*, 9 Ired., 328.

22. Where A, B and C were interested as the principal *cestuis que trust* in a deed of trust for slaves for the payment of debts, in which A was the trustee, and, by an agreement of the three, B, at a public sale under the deed by the trustee, bid off the slaves for the benefit of the three, it was held that by this sale the legal title vested in all as tenants in common. *Pitt v. Petway*, 12 Ired., 69.

23. In this state, it is held that if a tenant in common take a slave out of the State to parts unknown and sell him, the co-tenants may treat it as a destruction of the property; but a sale to a citizen of the State is not tantamount to a destruction, and therefore does not amount to a conversion. *Ibid.*

24. Where a bailment is made by one of two tenants in common, and the bailee undertakes to hold for him and subject to his order *alone*, the bailee is not estopped as to the other tenant in common, but, in an action by the two jointly against him, may show that the true title is in a third person. *Pitt v. Albritton*, 12 Ired., 74.

25. Tenants in common and partners may make a contract with one of their number, concerning the use of the property so held; and its violation will give a good cause of action at law to those injured. *Bond v. Hilton*, Busb., 308.

26. One tenant in common can bring ejectment against another, when there is an actual ouster. *Johnson v. Swain*, Busb., 335.

27. Though the possession of one tenant in common is, in law, the possession of all, yet if one have sole possession for twenty years, without any acknowledgement on his part of title in his co-tenants, and without any demand or claim on their parts to rent, profits or possession, they being under no disability, the law raises a presumption that such sole possession is rightful, and will protect it. Therefore, where, under such circumstances, the tenants who had been out of possession brought ejectment, *it was held* that their entry was tolled, and they could not recover. *Black v. Lindsay*, Busb., 467.

28. One tenant in common cannot sue his co-tenant in ejectment, unless there be an actual ouster either proved, or admitted by the pleading. *Halford v. Tetherow*, 2 Jones, 393.

29. Where A and B were tenants in common of a tract of land, and A, with the assent of B, employed a surveyor to run the boundaries of their land, and, in doing so, A, while accompanying the surveying party, committed a trespass on an adjoining tract, *it was held* that, as the surveying party was acting by his assent and with his concurrence, B was equally liable with A for the trespass, though he was not personally present when it was committed. *Elliott v. McKay*, 4 Jones, 59.

30. The county court has no jurisdiction to order a partition of money among tenants in common. *Billups v. Riddick*, 8 Jones, 163.

31. Upon the death of an ancestor seized of land, his heirs are at once seized of the land by descent; and more especially are they seized, if one of the co-heirs enter, for the entry of one tenant in common is the entry of all. *Childers v. Bumgarner*, 8 Jones, 297.

See (Account, 2-3-4.) (Ejectment—Of the declaration, 13-15

-16-22-23.) (Ejectment—Of the title necessary to support the action, 36-39-40-48-58.) (Ejectment—Of the defence and herein of the consent rule, 9.) (Ejectment—Judgment and writ of possession, 10.) (Estoppel—By matter other than by record or deed, 1.) (Execution—What may be levied on and sold under execution, 39.) (Ferry and Toll bridge, 6.) (Limitations—As to real estate, 10-17. (Limitations—When the statute will or will not bar, 65.) (Partition.) (Trover—When it will lie, 2-11.) (Waste, 10-15-16.)

TENANTS AT WILL AND FROM YEAR TO YEAR.

1. A tenancy at will is not created until the lessee enters *Pollock v. Kittrell*, N. C. Term, R. 152, (585.)

2. Where the owner of land agreed that A should cultivate it during his life, or as long as A pleased, with a restriction as to the sale of it, *held* that it was a tenancy at will and terminated with the death of the owner. *Mhoon v. Drizzle*, 3 Dev., 414.

3. Tenancy at will arises where the party has been let into possession, pending a treaty of purchase, or is let into possession under an agreement for a lease; and in such case the landlord cannot maintain an ejectment against the tenant without giving him a reasonable notice to quit, but he has a right, at his will and pleasure, to enter upon his freehold, and the tenant cannot have an action of trespass against him. *Walton v. File*, 1 Dev. and Bat., 567.

4. A party who has been let into the possession of land, under a contract of sale, or for a letting which has not been completed, is only a tenant at will of the vendor; and his interest is determinable *instantly* by a demand of the possession. In such a case, a three week's notice to quit is a determination of the tenancy; or, if the tenant do any act which amounts to a disclaimer of the vendor's or lessor's title, it operates as a forfeiture, and no notice to quit is necessary. *Luce v. Edmonston*, 1 Ired., 152.

5. Where a person is put into the possession of land by the owner, without any agreement for rent, and with an express provision that he shall leave it whenever the owner may require him to do so, he is not a tenant from year to year, but strictly a tenant at will, and is not entitled to six months notice to quit. *Humphries v. Humphries*, 3 Ired., 362.

6. A right to emblements does not give a right to the possession, or to an estate in the land, but only the privilege of ingress

and egress, as far as necessary for due attention to the crop. *Ibid.*

7. Where a tenancy is construed to be from year to year, if, after the commencement of a year there is an express leave for a certain time, and an agreement to quit at the end of that time, no notice to quit is necessary. *Williams v. Bennett*, 4 Ired., 122.

8. Wherever the relation of landlord and tenant exists, without any limitation as to time, such tenancy shall be from year to year, nor shall either party be at liberty to put an end to it unless by a regular notice, which must be given six months before and ending with the period at which the tenancy commenced. *Stedman v. McIntosh*, 4 Ired., 291.

9. There are several cases, in which the relation of landlord and tenant may terminate without any notice to quit, as where, by agreement of the parties notice is waived; or where its determination is made to depend on some particular event, as the death of a particular individual, or fixed by effluxion of time, it being to terminate at a particular period. *Ibid.*

10. Though courts lean against estates at will, yet such estates will still be created. *Ibid.*

11. Where A contracted with B that B should occupy his house and lot at \$14 *per annum*—rent to commence on the 26th of October, 1841, and if B should desire to remove from the house before October, 1842, he was to pay only for the time he occupied the house, *it was held* that this was not a tenancy from year to year, but that it terminated at farthest on the 26th of October, 1842, and that six months notice to quit was not necessary. *Ibid.*

12. The question as to notice to quit depends upon the contract between the parties. *Ibid.*

13. Six months notice to quit must be given to a tenant from year to year, before an action of ejectment can be commenced against him. *Irwin v. Cox*, 5 Ired., 521.

14. Where a person who had a lease until a day certain, having had notice to quit, held over, and an action of ejectment had been brought against him by the lessor, and pending this action he quitted the possession, and then the lessor sued him and recovered a certain sum for his use and occupation of the premises, during the time he held over, *it was held* that this was not a waiver of the notice, nor evidence of a new tenancy from year to year. But if the money thus recovered had been recovered or received as *rent*, it would have been evidence of a new tenancy. *Stedman v. McIntosh*, 5 Ired., 571.

15. The estate of a tenant at will is determined by a demand of possession by the owner, and also by his own conveyance in fee. *Howell v. Howell*, 7 Ired., 496.

16. Where B was found cutting wood on the land of A, who threatened to stop him unless he paid for what he had cut, which he did at a certain rate per cord, whereupon A told him he might

cut on as long as he chose at the same rate, and he did continue cutting a few months longer, occupying a small house as a kitchen for his hands, when he was entered on by a purchaser of the land from A, *it was held* that B was not a tenant from year to year, and was not entitled to a notice to quit. *Kitchen v. Pridgen*, 3 Jones, 49.

17. Where a deed granted a lease of land for the purpose of being explored for minerals, wherein the rent was made payable quarterly, and a forfeiture was to be created by a non user for a year, but with a right in the lessees to discontinue their operations at any time, and nothing was said as to the duration of the lease, *it was held* that the deed created a lease from year to year, and that six months' notice to quit was necessary before the lessors could put an end to the lease. *Patton v. Axley*, 5 Jones, 440.

18. If a tenant from year to year waive his right to a notice to quit, and leave the premises, *non animo revertendi*, he will be guilty of a trespass, if he return and take plank from a house which he himself built thereon. *Torrans v. Stricklin*, 7 Jones, 50.

19. Where one occupied land claiming it as his own, and when possession was demanded refused to deliver it up, *it was held* that he could not afterwards insist upon six months' notice as the privilege of a tenant from year. *Head v. Head*, 7 Jones, 620.

20. Where a person rented a tract of land for a year, and during that time joined the fences of an adjacent tract owned by himself to those of the rented land, and, at the end of the year, left the rented land without removing the fences, and, after five years entered upon the same land again, *it was held* that he was not a tenant to be entitled to a notice to quit before being sued in ejectment. *Borden v. Bell*, 8 Jones, 294.

See (Ejectment—Of the title necessary to support the action, 47–80.) (Landlord and tenant, 33–34.)

TENDER AND REFUSAL.

1. When an obligor is bound to deliver perishable articles, such as cattle, what is the effect of a tender and refusal of them, *quære*. *Mehaffy v. Spears*, 1 Hay., 142, (163.)

2. When a specific article like a slave is to be delivered, and no place is appointed, the debtor must give notice of his readiness to deliver on the day, and request the creditor to appoint a place where he will receive it; and the debtor must attend on the day until sunset, unless the creditor refuses or accepts before. *England v. Witherspoon*, 1 Hay., 361, (414.)

3. Where a note promises to pay money dischargeable in specific articles, a tender of all the different kinds must be proved, not of some only sufficient in value to discharge the debt. *Thompson v. Gaylord*, 2 Hay., 150, (326.)

4. It is not a legal tender to say, "her e I am ready;" the tenderer must have the money ready also. *North v. Mallett*, 2 Hay., 151, (329.)

5. Where notes, which had been paid for the purchase of goods, were agreed to be returned by the vendor, a tender of them by him was held good, although he had parted with the notes and got possession of them solely for the purpose of making the tender, under an engagement to return them again; the vendee disavowing to have any thing to do with the vendor, when asked to take back the papers. *Bell v. Ballance*, 1 Dev., 391.

6. Tender and refusal are equivalent to performance, but proof of ability to perform is necessary. As where, upon a contract to deliver notes, the defence was that the plaintiff refused to receive them, and insisted upon a part payment in money, and no evidence was offered of the defendant's ability to deliver the notes, it was held that the plaintiff was entitled to recover. *Mills v. Huggins*, 3 Dev., 58.

7. A bond for the delivery of specific articles can be discharged only by a delivery or a tender on the day specified. If they are cumbrous, the obligor may notify the obligee to appoint a place for their delivery, and if the latter neglect to attend, upon the plea of tender the obligor may prove that he was there ready and able to make the delivery. *Mingus v. Pritchett*, 3 Dev., 78.

8. Where a party is bound by his agreement to make a tender of an article at a particular place, and the other party apprizes him that he will not receive the article at all, it dispenses with the necessity of making the tender. *Mobley v. Fossett*, 3 Dev. and Bat., 96.

9. Bank notes are not a lawful tender in fulfillment of a contract to pay money. *Donaldson v. Benton*, 4 Dev. and Bat., 435.

10. A plea that the amount claimed by the plaintiff, together with the costs then due, had been tendered to him since the commencement of the suit, is, as a plea, no bar to the plaintiff's action, though the money has been paid into court under that plea. *Murray v. Windley*, 7 Ired., 201.

11. The offer by one party to deliver a bond, which the other expresses his intention not to accept, though admitting its sufficiency, is a legal tender, without an exhibition of the writing, or proof of its being prepared and executed. *Abrams v. Suttles*, Busb., 99.

12. To support the plea of tender, it must be shown that it was made before the commencement of the suit. *Winningham v. Redding*, 6 Jones, 126.

See (Practice—Payment of money into court, 3.)

TOWNS.

1. Commissioners appointed by an act of assembly to lay off a town, sell the lots, and apply the proceeds to prescribed purposes, are not liable to the treasurer of public buildings for a surplus undisposed of by the act. *Davidson v. Robinson*, 1 Dev., 89.

2. The act of 1802, ch. 29, regulating the town of Hillsborough, enables the treasurer of the corporation to sue in his own name for penalties incurred by the by-laws authorized by that act, as well as for those imposed by the act itself. *Watts v. Scott*, 1 Dev., 291.

3. A warrant for a penalty imposed by a town ordinance is sufficient, if it be "to answer for violating the 28th section of the ordinances of said town," without setting forth that section or the facts alleged to be a breach of it. *Watts v. Scott*, 2 Dev., 1.

4. Under the provisions of the private acts regulating the town of Halifax, the commissioners have authority to call out the hands and command the personal labor of those residing within its corporate limits, for the purpose of repairing the streets. *State v. Commissioners of Halifax*, 4 Dev., 345.

5. The commissioners of a town are not bound by common law and of common right to repair the streets, and such a duty can only be imposed on them by some act of assembly for regulating the town. *Ibid.*

6. An ordinance of the commissioners of a town, directing under a penalty cattle to be penned at night, applies only to residents of the town; not to those living beyond the corporation limits, although their cattle may stray into the town. *Commissioners of Plymouth v. Pettijohn*, 4 Dev., 591.

7. One, who is not a corporator, but who comes into a town, and violates any of its ordinances, is subject to the penalties imposed therefor. *Ibid.*

8. Whether the commissioners of a town have power to forbid cattle, belonging to persons living without the town, to range in the streets, and to impose a penalty upon the owner, or distrain the cattle, *quere*. *Ibid.*

9. Where an act of the legislature, after reciting that a certain tract of land adjacent to Bath town "was granted and surveyed as a common for the use of the said town, but the title thereof hath never been fully confirmed," declared "that the said land shall be, and hereby is appointed a common to lie perpetually for the use and benefit of the inhabitants of Bath town, under such restrictions and regulations as are or shall be appointed for town commons; and that the inspection and immediate care of looking after the said common be in the commissioners of the said town for the time being," *it was held* that the

tract of land itself, and not a mere right of common in it, was thereby granted to the inhabitants of Bath town, to be held for a town common; and this especially where it appeared that a subsequent act provided "for fencing the town of Bath, and resurveying the common *belonging to the said town*." And, *it was held further*, that if the inhabitants of Bath town were not a corporation before, the act *ipso facto* created them a body politic for the purposes of that grant; and that a subsequent act continuing their corporate existence, under the name of "the commissioners of the town of Bath," enabled them to maintain an action of ejectment for the said land in that name. *Commissioners of the town of Bath v. Boyd*, 1 Ired., 194.

10. Under the act of 1840, ch. 57, "to incorporate the town of Rutherfordton," the persons elected town magistrates and commissioners are not indictable for refusing to accept said offices when duly elected; the act containing no provision to that effect. *State v. McEntire*, 3 Ired., 171.

11. The legislature may, if they think proper, require any person appointed to an office in any manner prescribed by law, to serve therein, under the pain of indictment, or any other penalty; but there is no principle of the common law that renders such an offence criminal. *Ibid.*

12. Under the above mentioned act "to incorporate the town of Rutherfordton," the election for town magistrate and commissioners must be held by the sheriff, or, at least by a sworn deputy; otherwise it is void. *Ibid.*

13. The commissioners of the town of Beaufort have authority, by an act of assembly, to make ordinances for the removal of public nuisances, and also all such necessary rules as may tend to the advantage, improvement and good government of the town, not inconsistent with the laws and constitution of the State. Under this power, the commissioners had authority to pass the following ordinance: "That every hog at large in the said town should be taken up and penned and advertised to be sold on the third day, unless the owner should pay the charge for taking up such hog; and if a sale is effected, the money arising therefrom, after paying the charges, will be paid over to the owner of such hog." *Hellen v. Noe*, 3 Ired., 493.

14. The ordinance of the corporation of a town, which is authorized to abate nuisances within the town, and which declares that hogs running at large are nuisances, operates as well upon non-residents who suffer their hogs to run within the limits of the town, as upon those who are actual residents. *Whitfield v. Longest*, 6 Ired., 268.

15. The commissioners of an incorporated town have no right to impose any taxes, but such as are expressly authorized by the act of incorporation. And a power to enact by-laws, for the good government of the town, does not, *of itself*, confer a right

to levy taxes. *Commissioners of Asheville v. Meares*, 7 Ired., 406.

16. By coming within a town and acting there, a person becomes liable as an inhabitant and member of the corporation. *Commissioners of Wilmington v. Roby*, 8 Ired., 250.

17. A municipal corporation, which has authority to grade the streets, is liable for any damage which may accrue to an individual from the work being done in an incautious and unskillful manner. *Mears v. Commissioners of Wilmington*, 9 Ired., 73.

18. The act, incorporating the town of Hendersonville and exempting the citizens of that town from working "on roads without the limits of that town," does not exempt them from working on the Buncombe Turnpike road, as provided by the charter of the Buncombe Turnpike Company, the roads referred to in the act of incorporation being the ordinary public roads of the county. *Buncombe Turnpike Company v. Baxter*, 10 Ired., 222.

19. A town ordinance imposed a penalty upon any licensed retailer who should on Sunday "open his shop where he retails for the purpose of selling," &c., adding that he should, "for each and every offence of selling or giving spirituous liquors upon Sunday forfeit," &c. *Held* that the *corpus delicti* under the ordinance was the selling, &c., and that no penalty was incurred by merely opening the shop for the purpose of selling. *Town Council of Lincolnton v. McCarter*, Busb., 429.

20. The intendant of the city of Raleigh is a member of the board of commissioners, and has a right to participate in making ordinances for the regulation of the public market, &c. *Intendant and Commissioners of the City of Raleigh v. Sorrell*, 1 Jones, 49.

21. The owners of slaves, residing within the limits of an incorporated town, are not exempted from the penalty for the failure of such slaves to work upon the public roads beyond the limits of such town unless they are expressly exempted in the charter of incorporation, or by a necessary implication; and a provision in the charter, requiring the commissioners to lay and collect a tax on the inhabitants of such town to repair the streets, is not such a necessary implication. *McBoyle v. Hours*, 1 Jones, 133.

22. Where the commissioners of an incorporated town, under the general authority in this charter to pass ordinances to preserve the peace and quiet of the town, establish an ordinance forbidding "all disorderly shouting, dancing and all tumultuous assemblies, on the part of slaves and free negroes in the streets, markets and other public places in said town," it was held that this prohibition was not limited to violations of pre-existing laws. *Commissioners of Washington v. Frank*, 1 Jones, 436.

23. Under such an ordinance as above stated, it was held to be proper that it should be left to the jury to determine whether the conduct charged amounted to a disturbance of the community. *Ibid.*

24. Under the charter of the city of Raleigh, the power of the commissioners to grant permission to apply to the county court for a license to retail spirits within the city, and to collect a tax for such permission, can only be exercised once a year by the board of commissioners in office, and can be acted upon only by a court sitting within the same year. *Commissioners of Raleigh v. Kane*, 2 Jones, 293.

25. The power of the board of commissioners to give such permission, and of the county court to grant such license, cannot be extended by the consent of an applicant, and, therefore, a license granted by the county court of Wake, under a permission given by, and paid for to a board, not in existence at the time of the session of the court, is void, and subjects the retailer to the penalty given by the charter. *Ibid.*

26. A town ordinance prohibiting a "person from a place infected with small pox," to enter such town, will embrace those persons only who left such infected place after the passage of the ordinance, and came immediately or directly to such town. *Commissioners of Salisbury v. Powe*, 6 Jones, 134.

27. The legislature can confer upon the commissioners of an incorporated town authority to levy a tax upon the property of its citizens, for the purpose of raising revenue, and it can make that authority over each subject of taxation unlimited. *Wingate v. Sluder*, 6 Jones, 552.

28. The authority vested in the commissioners of the town of Asheville to levy taxes by the acts of 1848 and 1850, ch. 321, is neither taken away nor abridged by the Revised Code, ch. 111. *Ibid.*

29. Where an act of assembly appointed commissioners to purchase land and lay it off into lots, with convenient streets, and provided that when so laid off, it was by force of that act "constituted and erected a town," and the land was laid off accordingly, with ascertained limits, and these boundaries were acknowledged by the inhabitants for sixty years, and the place was recognised as a town by several subsequent acts of assembly, *it was held* that it was a town incorporated with defined limits and boundaries. *Commissioners of Trenton v. McDaniel*, 7 Jones, 107.

30. Where the election of commissioners of an incorporated town was vested in the free male citizens thereof, *it was held* that the mere failure to elect commissioners for a long time did not destroy the right, but it continued as long as there were free male citizens enough to fill vacancies. *Ibid.*

31. Where a town ordinance provided that for certain disorderly conduct the offender should pay a penalty of not less than one, nor more than twenty dollars, *it was held* that such ordinance was void on account of its vagueness and uncertainty. *Commissioners of Louisburg v. Harris*, 7 Jones, 281.

32. The general assembly may delegate a portion of the general taxing power to incorporated towns for corporation purposes, and *it was held* that the act, Rev. Code, ch. 111, sec. 13, empowering the commissioners of incorporated towns to levy a tax, not exceeding \$25 upon retailers of spirituous liquors by the quart, or under, was a proper delegation of the taxing power. *Commissioners of Concord v. Patterson*, 8 Jones, 182.

See (Constitution—Acts which have been declared constitutional, 24.) (Constitution—Acts which have been declared to be unconstitutional, 8.) (Constitution—Construction of various clauses of the constitution, 4-16-22.) (Corporations—Of corporations generally, 25.) (Indictment—In what cases an indictment will lie, 14-16-94-95.) (Indictment—Form and matters relating thereto, 74-75-158-159.)

TREATY.

1. A statute may be annulled by a treaty where there is an interference, the treaty being the last expression of the public will. *Hamilton v. Eaton*, 2 Mar., 1, (83.)

2. The treaty of peace of 1783 was declared by an act of the assembly of this state, passed in 1787, to be law in this state, and the State, by adopting the constitution of the United States in 1789, declared the treaty to be the supreme law of the land. *Ibid.*

3. Under the 4th article of the treaty of peace with Great Britain in 1783, British creditors may recover their debts from the citizens of this state, though they were confiscated by the state during the revolution. *Ibid.*

4. The treaty of 1792 between the United States and the Netherlands provides that the subjects of either party may dispose of their *effects* by testament, and that their heirs shall receive such succession *ab intestato*, although not naturalized; *held* that the word "effects" includes real as well as personal estate. *University v. Miller*, 3 Dev., 188.

5. Courts cannot take notice judicially of what treaties with foreign countries are in force. This question must be determined by the executive. *Ibid.*

TRESPASS.

- | | |
|---|--|
| I. To persons and personal property,
when it will lie. | III. Merger of trespass in felony. |
| II. Trespass <i>quare clausum fregit</i> . | IV. Tender of amends before suit
brought. |

I. TO PERSONS AND PERSONAL PROPERTY, WHEN IT WILL LIE.

1. In trespass for arresting a slave, brought against a constable and others, the officer cannot justify under a warrant without producing it ; but the other defendants, who were summoned to aid him, may. If, however, they did more than was necessary to compel submission, as by beating the slave after his arrest, they become trespassers. *Branch v. Bradly*, 2 Hay., 53, (215.)

2. No man can be allowed to assert a right to property by violence ; and where the owner of a slave takes him by force from the possession of one who holds him, he is liable to an action of trespass. *Blount v. Mitchell*, Tay., 131, (80). S. C., 2 Hay., 65, (233.)

3. Trespass is the proper remedy against a person who takes out a *ca. sa.* upon a judgment, which he knows to be satisfied, and causes the defendant to be imprisoned, even though the plaintiff of record, who has been paid, may have assigned the judgment; the suit being against the plaintiff of record. *Bradley v. Carrington*, 1 Car., L. R., 369, (38.)

4. Trespass is the proper remedy against one who enters and searches the plaintiff's house, under a warrant to search for a runaway slave. *Gardner v. Neil*, 1 Car. L. R., 492, (104.)

5. An action of trespass for chattels will lie, either upon an actual or constructive possession. So, if the owner have the right of present possession, and can regain the possession when he pleases, though the actual possession be in another. *Carson v. Noblet*, 1 Car. L. R., 522, (136.)

6. When a slave cuts timber on land not belonging to his master, the master is liable in trespass, if the act was done by his command or assent; but if the act be the voluntary and willful act of the slave, the master will not be liable. *Campbell v. Staiert*, 2 Murph., 389.

7. Where the purchaser of land, finding that he had not acquired a good title, left the land after sowing it in wheat, then another person entered without having acquired a good title, and afterwards the first re-entered and cut the wheat, *it was held* that he could maintain trespass against the second for taking and carrying it away, he having acquired possession by cutting the wheat, and the other being a mere wrong doer. *Algood v. Hutchins*, 3 Murph., 496.

8. Whenever injury is done to goods in the actual possession of a servant, carrier or bailee, if the owner have the immediate right of possession, he may maintain trespass in his own name. Hence, where a horse was lent to one during the will of the lender, and was seized by virtue of an execution against the borrower, *it was held* that the lender could sustain trespass against the officer. *White v. Morris*, 1 Hawks, 301.

9. Trespass *vi et armis* is the proper remedy for an injury of which the defendant is the immediate cause, though it happen by accident or misfortune; therefore, for beating a drum in the highway, where a wagon and team were passing, by which the horses took fright, ran away and damaged the wagon, *it was held* that this was the proper action. *Loubz v. Hafner*, 1 Dev., 185.

10. In trespass for killing a slave, an outrage by him, less than a threatened felony, will justify the killing. *Pierce v. Myrick*, 1 Dev., 345.

11. Although for the abuse of valid process *case* for a malicious prosecution is the proper remedy, yet for an arrest under process void in itself, as where the justice or court had no jurisdiction of the subject matter, *trespass* ought to be brought. Hence trespass is proper for having the plaintiff arrested under a state's warrant for beating and harrassing the defendant's cattle, because the justice had no jurisdiction of the alleged offence. *Allen v. Greenlee*, 2 Dev., 370.

12. Where a judgment has been improperly entered up, the party suing out execution upon it will be a trespasser, if the court subsequently set aside the judgment and execution. *Bender v. Askew*, 3 Dev., 149.

13. Trespass *vi et armis* will lie against a deputy clerk for wrongfully issuing an execution, under which the plaintiff's property was sold. The principal clerk only is liable for a mere nonfeasance of his deputy, but for an unlawful act committed by the latter, *colore officii*, both are liable. *Coltraine v. McCain*, 3 Dev., 308.

14. If the sheriff arrest the defendant on a *ca. sa.* and then suffer him to go at large, he cannot afterwards retake him; and if he do so, he will be liable to the defendant in trespass for the false imprisonment. The sheriff will also be liable if the arrests were by his deputy, although the second arrest was made out of his county, it being by color of the deputy's office. *Spencer v. Moore*, 2 Dev. and Bat., 264.

15. The action of trespass *vi et armis* is the proper remedy where a dog is killed by a direct administration of poison—as where the poison is thrown to the dog mixed up with food. But where the defendant puts the poisoned food where he knows the dog will pass along and get it, *case* is the proper action. *Dodson v. Mock*, 4 Dev. and Bat., 146.

16. The distinction between injuries, which are the proper

subjects of an action of trespass, and those which are to be redressed by an action on the case, between injuries immediate and injuries consequential, is sometimes very subtle and attenuated. Acts, which are of themselves invasions upon the person or property in possession of another, are of the first class, or immediate injuries. Acts, which, by reason only of subsequent occurrences, occasion an injury to the person or property of another, which injury was either foreseen or ought to have been guarded against, are the subjects of an action by the party grieved because of this consequent injury, and come under the second class. *Ibid.*

17. There are some instances where, although the injury be immediate, it may be alleged as the consequence of negligence or inattention, and the action on the case may be maintained. But if the injury is entirely an indirect consequence of a previous act, it cannot be complained of as a trespass *vi et armis*. *Ibid.*

18. A purchaser of a growing crop of corn at an execution sale, must declare in trespass on his personal chattels, against one, who tortiously severs the corn, from the stalks, and throws it on the ground. *Brittain v. McKay*, 1 Ired., 265.

19. He who directs, aids or encourages another in the commission of a trespass, is himself a trespasser. *Ibid.*

20. Where one unintentionally does an act with force which produces an immediate injury, the person injured may bring an action of *trespass*, or an action *on the case*, and in the latter he declares upon the *negligence* or *carelessness* of the defendant. But when the forcible act is done *willfully* negligence is, of course, negatived, and the only remedy is *trespass* for the immediate injury. *Baldrige v. Allen*, 2 Ired., 206.

21. In such an action of trespass, damages for ulterior injuries, beyond the immediate injury, are to be recovered upon a *per quod*, on being specially stated in the declaration.

22. Where two persons cultivated a crop of corn in a field to which each claimed, but neither had, title, and of which neither had the actual possession, and one of them afterwards gathered the corn, piled it in heaps and left it for a week, he did not thereby acquire such an exclusive possession of the corn as enabled him to maintain an action of trespass against the other for removing it. *McGahey v. Moore*, 3 Ired., 35.

23. Under the act of 1840, ch. 37, which gives to the landlord, who has leased to a tenant, the rent to be paid in a part of the crop, a certain interest in the crop raised, if the tenant remain in possession until an execution against him is levied on the whole of the crop, although the landlord *may* perhaps have a special action on the case against the officer levying, yet he cannot maintain an action of trespass, for he has neither the possession nor the property. *Peebles v. Lassiter*, 11 Ired., 73. (See Rev. Code, ch. 63, sec. 1.)

24. When an act of violence, of itself, is complained of, trespass *vi et armis* is the proper action; but when the consequences only are complained of, then case is the proper action. *Kelly v. Lett*, 13 Ired., 50.

25. In some cases the party may waive the trespass, and bring case for the consequential damages; but where the act is alleged to be willfully done, trespass is the only action. The right of election cannot exist, except in cases where there is a separate and distinct cause of action, besides the trespass. *Ibid.*

26. Where it is alleged that the plaintiff was the owner of a mill a short distance below one occupied by the defendant, on the same stream, and that the defendant *willfully and with intent to injure the plaintiff*, frequently shut down his gates so as to accumulate a large head of water, and then raised them, whereby an immense volume of water ran with great force against the plaintiff's dam, and washed it away, *it was held* that trespass and not case was the proper remedy. *Ibid.*

27. Trespass *vi et armis* may be sustained against one who goes on the plaintiff's land and drives off his slaves, though he may not touch them. *McClees v. Sikes*, 1 Jones, 310.

28. If A, knowing or having good reason to believe that B is about to kill or injure the hogs of another, then in his, B's field, and permits his slave to go with B in pursuit of the hogs, which are killed by B and the slave, A will be liable in an action of trespass for such injury. *Mardree v. Sutton*, 2 Jones, 146.

29. Where college buildings, the title to which is in the trustees, are partly occupied by the students and teachers of the college, a steward who occupies another part of these buildings, without showing a lease, must be considered a mere servant of the proprietors, and if he refuse to leave upon their request he cannot maintain trespass against them for forcibly ejecting him. *Watson v. McEachin*, 2 Jones, 207.

30. For the taking out a state's warrant and having a person arrested, when the warrant is void for want of jurisdiction, trespass *vi et armis*, and not trespass on the case, is the proper remedy. *Zachary v. Holden*, 2 Jones, 453.

31. Where a person made a number of shingles on vacant land and left them, he can maintain trespass against one who carried them off against his will; and this, although the defendant acted under a license from a person who had obtained a grant for the land on which the shingles were made, after they were made but before they were removed. *Reader v. Moody*, 3 Jones, 372.

32. Trespass *vi et armis*, and not trespass on the case, is the proper remedy for an arrest on a void state's warrant. *Price v. Graham*, 3 Jones, 545.

33. When one agrees to work, himself and his slave, for another by the day, such agreement does not give to the employer any interest in the slave, and if the slave be taken away while

so employed, the owner must bring trespass, and not trespass on the case, for the injury. *Carter v. Streater*, 4 Jones, 62.

34. The action of trespass will lie for killing the plaintiff's hog, though it had eaten a chicken and had the reputation of being a chicken eating hog, and was at the time it was killed within seventy-five yards of the place where the defendant's chickens were usually found; for a hog does not by such acts become a common nuisance. *Morse v. Nixon*, 6 Jones, 293.

See (Bailment, 6, 7, 8,) (Execution—What may be levied on and sold under execution, 22.) (Executors and Administrators—Of their liability to creditors, 1.) (Seduction, 2.)

II. TRESPASS QUARE CLAUSUM FREGIT.

1. The husband dies leaving his widow in possession of land, which his heir aliens to a person who enters upon the widow, and the question is discussed whether she can, under the circumstances, maintain trespass *quare clausum fregit*. *Lee v. Ashly*, 1 Hay., 186, (214.)

2. Constructive possession is sufficient in this state to support trespass *quare clausum fregit*. *Kennedy v. Wheally*, 2 Hay., 402, (606.)

3. Possession alone will support trespass *quare clausum fregit* against a defendant who has interrupted that possession with force. *Pearson v. Smith*, Conf. Rep., 367, (444.)

4. If a trespass be committed on land between the day on which one purchases it at execution sale, and the day on which he obtains a deed for it from the sheriff, the purchaser has not such a possession by construction as will enable him to maintain trespass *quare clausum fregit*. *McMillan v. Hayley*, 2 Car. L. R., 89, (186.)

5. Possession alone is sufficient to maintain trespass *quare clausum fregit* against a wrong doer. *Myrick v. Bishop*, 1 Hawks, 485.

6. A person who enters into the possession of land under an equitable title, with the consent of the legal owner of the fee, acquires no estate of any kind or degree in it, and the legal owner may maintain trespass *quare clausum fregit* for an injury to it. *Jones v. Taylor*, 1 Dev., 434.

7. He who claims a title by estoppel is, as to those estopped, in the constructive possession of the land, and may maintain trespass. *Phelps v. Blount*, 2 Dev., 177.

8. Actual possession of land consists in exercising that dominion over it, and making that profit from it, of which it is susceptible in *its present state*. But these must be characteristic of ownership; and they will not be sufficient, if they are done at long intervals and are consistent with the character of a trespasser. *Simpson v. Blount*, 3 Dev., 34.

9. An unsealed memorandum, given by the owner of land, stating that A is the owner of a house upon the premises and authorizing its removal, is a mere license to enter, and is revoked by a subsequent conveyance of the land by the owner to B, who may maintain trespass *quare clausum fregit* against the licensee for the removal of the house. *Whitaker v. Cawthorne*, 3 Dev., 389.

10. One who rents turpentine boxes, agreeing to give a certain part of the turpentine for rent, is not a tenant in possession and has no interest in the soil, and the real owner may bring trespass *quare clausum fregit*, for an entry upon the land, and for taking away the turpentine also. *Graham v. Houston*, 4 Dev., 232.

11. For acts done after an ouster, no action lies except for the first entry, until a re-entry by the owner. *Ibid.*

12. In trespass *quare clausum fregit*, if the plaintiff fail to prove title to the *locus in quo*, he must prove, in order to entitle himself to recover, that the trespass was committed on lands in his possession, either enclosed or improved by cultivation. *Smith v. Wilson*, 1 Dev. and Bat., 40.

13. Every unauthorized intrusion into the land of another is a sufficient trespass to support an action *for breaking the close*, whether the land be actually enclosed or not; and from every such entry the law infers some damage, at least that of treading down the grass or shrubbery. *Daugherty v. Stepp*, 1 Dev. and Bat., 371.

14. If one enters into the possession of land under a treaty of purchase with the owner, he becomes a tenant at the will of the owner, and cannot sustain an action of trespass *quare clausum fregit* against such owner, for entering upon the premises without his consent. *Walton v. File*, 1 Dev. and Bat., 567.

15. The action of trespass *quare clausum fregit*, being a remedy for an injury to the possession, cannot be maintained by one who had not the possession when the wrong was done. But where there is no actual possession in another, the law adjudges him in possession who has the property; and this possession, which is usually called constructive possession, is fully sufficient to maintain the action. *Dobbs v. Gullidge*, 4 Dev. and Bat., 68.

16. The action of trespass *quare clausum fregit* is purely a personal action, sounding wholly in damages, and if permitted to survive the person damaged, survives to his executor or administrator. It cannot be revived by the heir or devisee of the person injured. *Ibid.*

17. The possession by the owner, of a part of a tract of land, is the possession of the whole tract, only so long as no other person is in the actual adverse possession of any part. As soon as another takes possession of any part, either with or without title, the former possessor loses possession of that part, and cannot maintain trespass *quare clausum fregit* for any act done

on such part while he is thus out of possession of it. *Ring v. King*, 4 Dev. and Bat., 164.

18. The action of trespass *quare clausum fregit* cannot be maintained without possession. *Tredwell v. Reddick*, 1 Ired., 56.

19. Possession alone is sufficient to maintain trespass *quare clausum fregit* against mere *tort feasors*. And, in such action, all procurers, aiders and abettors—nay, even those who are not privy to the commission of a trespass for their use and benefit, but who afterwards assent to it, are equally liable with those who commit the trespass. *Horton v. Hensley*, 1 Ired., 163.

20. A grant of the vesture or herbage of land passes a particular right in the land itself. Such a grantee may therefore maintain trespass *quare clausum fregit* for any interruption of his possession. But there is a distinction between those profits which are the spontaneous products of the earth, and the corn, &c., which are produced annually by labor and industry, and thence are called *fructus industriales*. The latter are, for most purposes, regarded as personal chattels, and a sale of them while growing is only a sale of goods. *Brittain v. McKay*, 1 Ired., 265.

21. If an injury to another's land be immediate, and committed with force, either actual or implied, it is the subject of an action of trespass *vi et armis quare clausum fregit*, whether the injury were *willful or not*. Hence, where a person was cutting down trees on his own land, and one of them accidentally fell on his neighbor's land, *it was held* that trespass *quare clausum fregit* would lie, whether there was any grass or other vegetable matter growing on the ground or not. *Newsom v. Anderson*, 2 Ired., 42.

22. Where one grants a tract of land, reserving the saw-mill timber growing on it, *it was held* that if he were injured by the grantee of the land cutting down such timber, his proper remedy was an action of trespass *quare clausum fregit*. *Robinson v. Gee*, 4 Ired., 186.

23. The entry of an owner upon a trespasser will enable the owner to maintain trespass; but it must be an entry for the purpose of taking possession, which may be evinced by acts of ownership on the land, as ploughing it, or the like, or by a formal declaration of the intention accompanying the entry. *Bynum v. Carter*, 4 Ired., 310.

24. But although such entry be made, yet if the wrong doer continue his possession, and the owner make a deed for the land, but not while he is actually upon it, the adverse possession of the wrong doer will prevent the title from passing, so as to enable the vendor to maintain trespass *quare clausum fregit*. *Ibid.*

25. Where land, though covered by water, is the subject of entry and grant, the grantee may maintain trespass *quare clau-*

sum fregit for an unlawful invasion of it. *Smith v. Ingram*, 7 Ired., 175.

26. A person having the actual or constructive possession of land may bring trespass *quare clausum fregit* against a wrong doer for disseizing him, after the time of the disseizure, but he can recover damages only for the act of dispossession. He cannot recover the ulterior damages until he regains possession; and when he does so, the law will deem him to have been in possession from the first ouster, and entitle him to damages for all the time the defendant wrongfully held the land. *Ibid.*

27. In order to entitle a person to maintain trespass *quare clausum fregit*, where he has no occupation of any part of the premises, he must show a title in himself from which the law can deduce, that constructively, he has the possession. *Cohoon v. Simmons*, 7 Ired., 189.

28. A plaintiff may recover damages for a wrongful entry upon his land by a disseisor, although he may not have regained possession of his land at the time of the action brought. *Gilchrist v. McLaughlin*, 7 Ired., 310.

29. Every man is presumed in law to intend any consequence, which naturally flows from an unlawful act, and is answerable to private individuals for any injury so sustained. Therefore, the defendant was liable in an action of trespass *quare clausum fregit*, for the loss of hogs, &c., caused by the unlawful breaking down of the plaintiff's fence. *Welch v. Piercy*, 7 Ired., 365.

30. Where a man, who purchases land at an execution sale, enters upon the premises, while the original owner is in possession, he cannot justify this trespass, on the mere ground that he was the purchaser at the sale, if he had not received the sheriff's deed until after the time of the alleged trespass. *Presnell v. Ramsour*, 8 Ired., 505.

31. The sheriff's deed has relation back to the time of the sale, as to the title, but not as to the action of trespass founded on possession. *Ibid.*

32. The action of trespass *quare clausum fregit* is a remedy for an injury to the possession, and therefore cannot be maintained by one who had not the possession, at the time the injury was alleged to have been committed. *Patterson v. Bodenhammer*, 11 Ired., 4.

33. Where A leased land to B and others for the use of a public school, and the lessees put into the school room certain tables and benches, and before the expiration of the lease took them away; it was held that A had no possession actual or constructive to enable him to maintain trespass *quare clausum fregit*. *Brooks v. Stinson*, Busb., 72.

34. In an action of trespass to land, the defendant can justify

upon the ground, that he entered as the servant of one, in whom were the title and right of possession. *Everett v. Smith*, Busb. 303.

35. In trespass *quare clausum fregit*, the plaintiff, not in actual possession, must rely upon his title. *McCormick v. Munroe*, 1 Jones, 13.

36. Where the bargainor in a deed, after executing a conveyance, remains in the occupation of the land, and, contrary to the expressed wishes of the bargainee, cuts down timber, he is liable to the action of trespass *quare clausum fregit*. *Spencer v. Weatherly*, 1 Jones, 327.

37. Where two persons entered into partnership for the fraudulent purpose of hindering or delaying the creditors of one of them in the collection of their debts from him, such persons cannot jointly maintain trespass *quare clausum fregit* against one who forcibly entered the store house and seized the goods. *McPherson v. Pemberton*, 1 Jones, 378.

38. In an action of trespass *quare clausum fregit* for entering upon the plaintiff's land and burning his machine house and machine, he may recover not only the value of that property but also the value of wheat belonging to other persons brought there to be threshed out for a certain toll. *Rippey v. Miller*, 1 Jones, 479.

39. Where one not having title goes on land which he claims, and drives off the hands of the defendant who were working on it, and who, after going and depositing their tools in the public road and leaving one of their number to take care of them, find their master, who returns with them to the place where the plaintiff is, and sets them to work against his remonstrances, the plaintiff has no such possession as will sustain the action of trespass *quare clausum fregit*. *Morris v. Hayes*, 2 Jones, 93.

40. The lessor of a tenant at will cannot maintain an action of trespass *quare clausum fregit* against one for entry upon the premises, unless there was some actual injury done to the land, besides the mere technical injury of treading down the grass. *Smith v. Fortesque*, 3 Jones, 65.

41. Where the owner of a mill has, by a grant, the right to use the dam and pond as an *easement* incident to the mill, he cannot maintain trespass *quare clausum fregit* for an injury to the soil of the dam, but trespass on the case would be the proper form of action. *Whitehead v. Garris*, 3 Jones, 171.

42. Where a guardian gave license to a person to cut timber on the land of his wards, and the wards, in a suit against the guardian for a settlement, recovered the money received by him for a part of the timber so cut and carried off, *it was held* that they had thereby sanctioned the transaction and could not sustain trespass *quare clausum fregit* against the person who had taken off the timber. *Burnett v. Beasley*, 5 Jones, 335.

43. Where A has an estate for life in possession in a term for

ninety-nine years, B has an estate in remainder for the residue of the term, and A has the reversion expectant upon the term, and a stranger enters, cuts the timber trees and takes them off; in an action of trespass *quare clausum fregit* by A against the trespasser, he may, by means of declaring *per quod*, recover the entire value of the timber, B being entitled to no part thereof, though he could sustain an action of trespass on the case in the nature of waste, to recover damages for the injury done to his estate in remainder. *Burnett v. Thompson*, 6 Jones, 210. S. C. and S. P., 7 Jones, 407.

44. A warrant to survey a tract of land which is not vacant, is void for the want of power to issue it, and of course, cannot justify an entry and the cutting of switches in making a survey; and the proper remedy for the unlawful entry is trespass *quare clausum fregit*, and not an action on the case. *Harry v. Graham*, 6 Jones, 460.

45. Where the owner of land conveyed it, but reserved an easement therein for an avenue, and afterwards built a house in the avenue, *it was held* that trespass *quare clausum fregit* was the proper remedy of the grantee against him. *Hays v. Askew*, 7 Jones, 272.

46. If a person enter into the adverse possession of a tract of land having known boundaries, and hold it for more than three years, he cannot be sued in trespass *quare clausum fregit* until the owner can regain the possession by an action of ejectment, which he must bring within twenty years, to avoid having the presumption of a deed raised against him. *McMillan v. Turner*, 7 Jones, 435.

47. In trespass *quare clausum fregit*, the rule, that where neither party has possession of the lappage where two patents interfere, the superior title draws to it the constructive possession and excludes that of the inferior title, may be asserted by one who is not connected with the superior title, against the suit of one claiming under the inferior title. *McLean v. Murchison*, 8 Jones, 38.

See (Entry, 6.) (Estoppel—By matter of record, 6-12-13.) (Landlord and tenant, 29-30.) (Possession, 23-27-28-30.) (Tenant in common, 6-13-29.)

III. MERGER OF TRESPASS IN FELONY.

1. Trespass for killing a slave, commenced before the indictment tried, may be tried after an acquittal upon the indictment, and the fact of the acquittal shows that no felony had been committed, in which the felony could merge. *Smith v. Weaver*, Tay., 58, (42.) S. C., 2 Hay., 108, (266.)

2. The merger of a trespass in felony (where the trespass is a felony) is a doctrine of the English law, founded not on policy,

but on the king's right by forfeiture; and as forfeiture here is not a consequence of felony, or at any rate, if it be, is never asserted, the doctrine does not apply in this state. *White v. Fort*, 3 Hawks, 251.

IV. TENDER OF AMENDS BEFORE SUIT BROUGHT.

1. Where a person occupying land adjoining that of another, and in ignorance of the true boundaries of the respective tracts, trespasses upon such adjacent land, but disclaims title and tenders reasonable amends before a suit is brought, he is protected from the action under the act, Rev. Stat., ch. 31, sec. 83. *Blackburn v. Bowman*, 1 Jones, 441. (See Rev. Code, ch. 31, sec. 79.)

TRIAL.

See (Practice—Of trial and its incidents.)

TROVER.

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| I. When the action will, or will not, lie. | III. Effect of the verdict and judgment. |
| II. What is a conversion. | IV. Abatement of the action. |

I. WHEN THE ACTION WILL, OR WILL NOT, LIE.

1. A purchaser of a chattel, from one who has it as a bailee for a special purpose, may recover in trover from any person except the rightful owner. *Hughes v. Giles*, 1 Hay., 26, (35.)

2. If one of two joint owners of a vessel take possession of her, no action will lie for this, for each has an equal right to the possession; but if after taking possession he destroy the property, he is then liable; therefore, if against or without the consent of the other, he send the vessel to sea where she is lost, it may be considered a destruction, so that trover will lie against the person sending her. *Lowthorp v. Smith*, 1 Hay., 255, (294.)

3. Trover is founded on the right of property exclusively, and therefore plaintiff cannot recover, if defendant prove property in another, when the conversion took place. *Hostler v. Scull*, 2 Hay., 139, (312.) S. C., Tay., 152, (95.)

4. A bequeathed slaves to his wife during her life, and after her death to be sold and equally divided among his children; and after the wife's death, the slaves were converted; held that

the executors might maintain trover, because their assent did not extend beyond the life estate of the wife, as they had duties to perform after her death. *Allen v. Watson*, 1 Murph., 189.

5. An agreement for a valuable consideration to deliver to the plaintiff the first female colt which a certain mare, owned by the defendant, might produce, vests the property of the colt when produced in the plaintiff, and he may maintain trover for the colt. *Fonville v. Casey*, 1 Murph., 389.

6. The interest which an overseer has in the part of a crop which he is to receive for his wages is not such that his assignee can, upon a demand and refusal, bring trover for it before it has been set apart for him, though the corn be then gathered. *Wood v. Atkinson*, 2 Murph., 87.

7. If a *feme sole* have a chattel and marry, and then her husband dies, and she take the chattel and deliver him to her son, to whom she had by deed given him after her death, before she was married, the son cannot maintain trover against a person who gets possession of the slave, because the title is in the representative of the husband, and did not belong to the wife. *Black v. Beatty*, 2 Murph., 240. S. C., 1 Car. L. R., 96, (12.)

8. Trover will lie for a tar kiln, or any other cumbrous article purchased at execution sale, which the owner of the land on which it is situated refuses to permit to be removed, by forbidding the purchaser to come on his land, and such refusal and prohibition is evidence of a conversion. *Nichols v. Newsom*, 2 Murph., 302. S. C., 1 Car. L. R., 227, (17.)

9. Trover cannot be maintained upon the possession of a chattel, where it appears that the legal title is in another, and that the plaintiff has only a trust. *Laspeyre v. McFarland*, N. C. Term, R., 187, (620.)

10. Trover will lie for a justice's judgment, in which the plaintiff has a property. *Hudspeth v. Wilson*, 2 Dev., 372. (Overruled in *Cobb v. Cornegay*, 6 Ired., 358.)

11. Joint tenants, or tenants in common, of a chattel have equal rights to its possession, and cannot maintain trover against each other, unless the joint property be destroyed. But a disposition of a chattel by one joint tenant, or tenant in common, which prevents the other from recovering it, is equivalent to its destruction. *Lucas v. Wasson*, 3 Dev., 398.

12. In trover the plaintiff must have both the right of property and of present possession, and when one, who had hired a slave for a year, sold him, and the owner brought trover during the term, *it was held* that he could not recover, although the defendant claimed an absolute interest in the slave. *Andrews v. Shaw*, 4 Dev., 70.

13. A person who, not being the guardian of infants, takes upon himself to hire out their slaves, making the bonds payable to himself, is a wrongdoer and may be liable in trover for a con-

version; and the proper measure of damages is the amount of the hiring, with interest from the expiration of the credit. *Dunston v. Hardy*, 4 Dev., 572.

14. Where a slave, who was bequeathed to one for life and then over, had been carried off and not heard from more than seven years before the death of the tenant for life, *it was held* in an action of trover for the slave by the ultimate proprietor, after the death of tenant for life, that a presumption of the slave's death arose after seven years absence without being heard from, and that the plaintiff must fail in his action, because there was no proof of property in himself, nor a conversion by the defendant, both of which were necessary to sustain his case. *Lewis v. Mobley*, 4 Dev. and Bat., 323.

15. To maintain the action of trover, it is indispensable that the plaintiff should show a conversion by the defendant of property whereunto the plaintiff, *at the time of that conversion*, had a present right of possession. Therefore, where the purchaser of a slave from the tenant for life sold him *out and out*, during the life of the tenant for life, *it was held* that the ultimate proprietor could not maintain trover against the seller for the alleged conversion, because, during the life of the tenant for life, his right of possession had not accrued, and after the death of such tenant there was no act of conversion. *Ibid.*

16. In trover the death of a slave converted does not effect the plaintiff's right to recover his value, because by the conversion the defendant made him his own. *Bethea v. McLennon*, 1 Ired., 523.

17. An action of trover will not lie by one, who is entitled to a remainder in slaves, after the expiration of a life estate therein, against another remainderman, who, during the continuance of the life estate which he had purchased, removed the slaves to parts unknown, so that they could not be found. But, the estate in remainder, being a legal estate, a special action on the case may be maintained to redress such injury. *Cole v. Robinson*, 1 Ired., 541.

18. Where property bailed has been lost by the bailee, or stolen from him, or been destroyed by accident or from negligence, trover will not lie, but *case* is the proper remedy. But where the bailee has been an agent in the destruction of the property, or in its injurious conversion, trover will lie against him. *Simmons v. Sikes*, 2 Ired., 98.

19. An action of trover will not lie against an officer for levying on goods, which he has seized by virtue of an execution, legal in all its forms, issued against the plaintiff and directed to such officer. *Stewart v. Ray*, 4 Ired., 269.

20. Trover will not lie for a justice's judgment, because it is not the property of the plaintiff. It is not a record, but it is a judicial determination and muniment of the rights of both parties. *Cobb v. Cornegay*, 6 Ired., 358.

21. Where the defendant, in consideration of a debt he owed, agreed to let the plaintiff have a bed and furniture of the value of \$28, but no particular bed and furniture were conveyed or delivered, and afterwards the defendant refused to deliver any bed and furniture, *it was held* that the action of trover would not lie. *Jones v. Morris*, 7 Ired., 370.

22. Trover will not lie, except for one, who has the immediate right of possession at the time of the conversion. It is not sufficient to support this action, that an unwarrantable injury has been done to the plaintiff's right of property; as the right of property and the right of immediate possession must both concur. *Murchison v. White*, 8 Ired., 52.

23. Where A claimed under a mortgage of personal property, executed in January, 1843, but not registered until the following April, and the sheriff in March, 1843, levied an attachment on the property and sold it without any order in the cause, *it was held* that though the sheriff's act in selling may have been without any legal authority, yet A, being entitled only from the registration of his mortgage, could not maintain trover against him. *Ibid.*

24. To sustain the action of trover, the right of property in the thing claimed, and of possession at the time of the alleged conversion, must be vested in the plaintiff. *Brazier v. Ansley*, 11 Ired., 12.

25. In an action of trover, except for a mere temporary conversion, the plaintiff recovers the value of the property converted, and, therefore, to entitle him to recover, he must have title and a possession, or a present right of possession. *Barwick v. Barwick*, 11 Ired., 80.

26. A negro slave, who was permitted by his master to own a horse, was afterwards sold to A, and the horse was taken to the latter's house. A directed the negro to take the horse away, and he was accordingly given to the negro's son, who was the slave of B, but B set up no claim to the horse, and his slave sold him to another person; and *it was held* that A could not support trover, or any other action, against B for the value of the horse. *Francis v. Welch*, 11 Ired., 215.

27. Trover will not lie to recover for the conversion of a judgment, either given by a justice or rendered in a court of record; nor will it lie for a note, on which a judgment has been obtained, because it is defunct, being merged in the judgment. *Platt v. Potts*, 11 Ired., 266.

28. Trover will lie for promissory notes, by the administrator of the payee against a donee by oral gift, though the gift be accompanied by delivery. *Brickhouse v. Brickhouse*, 11 Ired., 404.

29. If an officer levy upon and sell a growing crop when he has no right to do so, he will be as liable to an action of trover

as the purchaser who gathers it. *Shannon v. Jones*, 12 Ired., 206.

30. When a man built a fence upon a piece of land to which he had no title, and the owner of the land removed the rails and kept possession of them, *it was held* that the former could not maintain trover against the latter for the rails, because by being put upon his freehold they became his property. *Wentz v. Fincher*, 12 Ired., 297.

31. The owner of a slave died intestate and no administration was ever granted on his estate; but the next of kin took possession of the slave and kept him for seven years, when they sold him to B, who kept him ten years and sold him to C, with whom he remained four years and then ran away, and was taken up and confined in jail from which he was taken by D, who upon a demand by C refused to deliver him up; and *it was held* that under the circumstances, C's possession entitled him to an action of trover against D, who was a mere wrong-doer, setting up no title in himself. *Craig v. Miller*, 12 Ired., 375.

32. A having possession of a note payable to B, but not endorsed, and claiming the property therein, placed it for collection in the hands of C, who converted the proceeds to his own use; and *it was held* that A could not support an action of trover against C, either for the note or the proceeds, because he had not the legal title to either. *Herring v. Tilghman*, 13 Ired., 392.

33. To maintain trover, the plaintiff must show title, or a right of possession, the owner being unknown. *Ibid.*

34. One who is an equitable owner of a bond, but to whom it has not been legally endorsed, has not such an interest in it as will enable him to support trover. *Killian v. Carrol*, 13 Ired., 431.

35. Where A let turpentine trees to B, and was by the contract to receive a share of the crop made by him, *it was held* that A could not maintain trover for the conversion of the turpentine, before a division. *Rooks v. Moore*, Busb., 1.

36. The action of trover will not lie for a levy and sale of chattels under an attachment sued out maliciously and without probable cause; the proper form of action being trespass on the case for the tort. *Rogers v. Pitman*, 2 Jones, 56.

37. Where ten sacks of salt were bought and paid for by B, with the funds of A, and at the same time B bought and paid for five sacks with his own funds, and all the sacks were delivered to him unmarked, and without any separation or distinct appropriation of any particular sacks to either, and C, having received them from B, with instructions to deliver ten sacks to A, nevertheless converted them; *it was held* that A could not maintain an action of trover for them. *Hill v. Robison*, 3 Jones, 501.

38. Where a person is in the possession of land and makes

turpentine, it becomes a personal chattel as soon as it runs into the boxes cut in the trees, and he can maintain trover for it against one who dips it from them and carries it off, though the real title of the land may be in a third person. *Branch v. Morrison*, 5 Jones, 16.

39. In a case like the one just above stated, the person in possession can maintain trover even against the owner of the land, for the reason that, as soon as the turpentine ran into the boxes, it became the personal property of the person who was in the actual adverse possession of the land. *Ibid.* S. P. *Branch v. Campbell*, 7 Jones, 378.

40. A report by a commissioner in equity appointed to divide slaves among tenants in common, followed by a decree confirming the same, passes the right of property from the date of the report, and will enable a party acquiring such right, to maintain trover for a conversion, between the date of such report and the final decree. *Dixon v. Warters*, 8 Jones, 449.

See (Bailment, 6-7-8.) (Contract—Construction of contracts and when an action will lie, 71.) (Contract—Of the sale of personal chattels, 25.) (Deed—Deeds in trust, 15.) (*Donatio causa mortis*, 2.) (Execution—What may be levied on and sold under execution, 18-22.) (Execution—Purchaser at execution sale, 3.) (Executors and Administrators—Of their liability to creditors, &c., 1-7.) (Joint Tenants, 1-2-3.) (Remainder—In chattel property, 15.) (Tenant in Common, 1-4.)

II. WHAT IS A CONVERSION.

1. An act of ownership over personal property inconsistent with the rights of others is a conversion; therefore, when an administrator exposes to public sale chattels found in the possession of his intestate at his death, it is a conversion as against the owner. *Carraway v. Burbank*, 1 Dev., 306.

2. A refusal to deliver upon demand is not the conversion, but it is the possession afterwards, which is qualified by the refusal and shown to be adverse, after the right to possess is put an end to by the demand of the owner. *Ibid.*

3. Possession accompanied with a claim of title is a conversion; but a mere bailee, who claims no title either for himself or his bailor, and, upon a demand of possession, only asks for time to surrender the property to his bailor, is not guilty of a conversion. *Dowl v. Wadsworth*, 2 Dev., 130.

4. One, who is in the possession of the property of another, is bound to surrender it upon the demand of the owner; but if he do not know the applicant to be the owner, he has a right to reasonable proof of the fact. *Ibid.*

5. Where one residuary legatee, who had hired a slave, part of the residue, from the executor for one year, sold him tortious-

ly in the presence of a joint legatee, who did not disclose his title, *it was held* that, though the joint legatee had waived his title in favor of the purchaser, he had not been guilty of any conversion as against the executor, who could not, therefore, maintain trover against him. *Oxley v. Freeman*, 4 Dev., 472.

6. In an action of trover for lumber, if it appear that the defendant's slaves took the timber and sawed it without or against his orders, or even by mistake, yet if the lumber when sawed came to the defendant's use either by being sold or otherwise appropriated to his benefit, this was a conversion, and the plaintiff is entitled to recover the value of the timber in this action. *Lee v. McKay*, 3 Ired., 29.

7. The wrongful dominion and assumption of property in personal chattels, by one who menaces the rightful owner if he attempt to take them, amount *in law* to a conversion, and are not merely evidence of a conversion to be left to the jury. *Hare v. Pearson*, 4 Ired., 76.

8. The conversion which is necessary to support trover must be of the property described in the declaration; and, therefore, where trover was brought for a negro man named John, *it was held* that the negro converted must be proved to be named John. *Ward v. Smith*, 8 Ired., 296.

9. Any act of ownership over personal property taken, which is inconsistent with the owner's right of dominion over it, is evidence of a conversion. But where no act is done; where there is no refusal to deliver and no claim to the property; where in truth the defendant is wholly passive; though the property was found in his possession, it does not, *per se*, subject the defendant to an action of trover. *Ragsdale v. Williams*, 8 Ired., 498.

10. A conversion, to subject a defendant in an action of trover, is an appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, in exclusion or defiance of the plaintiff's rights, or in withholding the possession from the plaintiff, under a claim of right inconsistent with his own. *Glover v. Riddick*, 11 Ired., 582.

11. Giving to a negro a certificate that he is free does not amount to a conversion in the person giving the certificate, if the negro should turn out to be a slave. *Ibid.*

12. Where a constable, by levy and actual seizure of a slave, had acquired a right to the property for the satisfaction of executions in his hands, and delivered such slave to the jailor of his county for safe keeping, a refusal of the jailor to re-deliver the said slave, by the command of the sheriff, *was held*, in an action of trover by the constable against the sheriff, to be evidence of a conversion. *McDaniel v. Nethercut*, 8 Jones, 97.

13. Where an article has been delivered as a bailment by a person who was not the owner, and afterwards the bailee surrenders it to the true owner upon his demand for it, it is not a

conversion of the article by the bailee as to the person from whom he received it, when the demand of the owner was made before such person made his demand. *Thompson v. Andrews*, 8 Jones, 125.

See (Trover—When it will lie, 8.) (Tenant in common, 23.)

III. EFFECT OF THE VERDICT AND JUDGMENT.

1. A recovery in trover vests the property in the defendant; and a bar in trover, or verdict for the defendant, is *prima facie*, and most generally, a proof of property in him, but it is not conclusive, and may be rebutted by showing that some other fact besides the right of property caused the verdict for the defendant. *Wright v. Walker*, 2 Hay., 16, (167.)

2. A recovery in trover for a promissory note or bill, and payment of the damages, divest the property out of the plaintiff, and, indeed, vest it in the defendant, as between him and the plaintiff. *Brickhouse v. Brickhouse*, 11 Ired., 404.

IV. ABATEMENT OF THE ACTION.

See (Abatement—By the death of parties, 9.)

TRUSTEE AND TRUSTS.

1. A trustee cannot become a purchaser at his own sale; and it would seem that no circumstances can justify a departure from this rule. *Gordon v. Finlay*, 3 Hawks, 239.

2. At law a trustee is for all purposes seized in fee (where the conveyance is to him in fee) and may sue for an injury to his estate without reference to the interests of the *cestui que trust*. *Mordecai v. Parker*, 3 Dev., 425.

3. It is a common remark that courts of law do not notice trusts. Certainly they do not for the purpose of administering them, for this is the peculiar function of courts of equity. But all courts must notice the legislative will duly expressed, and therefore deny validity to what that will for any cause denies a legal existence. *Shober v. Hauser*, 4 Dev. and Bat., 91.

4. It is immaterial how the illegal purpose is manifested, whether by way of trust, or covenant, or collateral engagement; the moment that illegal purpose is judicially ascertained, the penalty of the law attaches to the denounced transaction. *Ibid.*

5. The debtor may act as agent for his trustee in selling or exchanging articles of the trust property, and an exchange made

by the debtor without any precedent authority from the trustee, but subsequently ratified by him, will vest the title of the article taken in exchange in the trustee, as against the debtor, or those claiming as his creditors, if not from the time of the exchange, at least from its ratification. *Hubbard v. Winborne*, 4 Dev. and Bat., 137.

6. To permit the debtor, who remains in possession after conveying his property in trust, to exchange articles of the trust property for others by the assent of the trustee, is not such an evasion of the statute requiring the registry of deeds of trust, as to prevent the trustee from acquiring the legal title to the article taken in exchange—How far it may go as an argument of fraud from the deception on creditors to which it tends, *quære*. *Ibid*.

7. Upon a sale of goods made by a trustee, mutually appointed by the parties contending for the goods or their proceeds, if it were part of the agreement that the trustee should at all events collect the money, and hold it subject to the decision of certain arbitrators, then, in a suit by the trustee for the price of the goods before any award made, it would be repugnant to the agreement to permit one of the parties who purchased the goods, to withhold the purchase money upon an *allegation* of a preferable claim, or to suffer the validity of such claim to be adjudged when its opponents had not an opportunity to contest it. *Islay v. Stewart*, 4 Dev. and Bat., 160.

8. A *cestui que trust* is not entitled to call for the legal estate, when, from the nature of the trust, his ownership is not immediate and absolute, and where it would defeat, or put it in his power to defeat or endanger, a legitimate ulterior limitation of the trust. Hence, where by will made since 1827, property was conveyed to A in trust for the use of B, and that he would pay over to him annually the net income or interest accruing therefrom; but if B should die without lawful issue, then the property to be held for others: *it was held* that B could not compel A to convey to him the legal estate. *Battle v. Petway*, 5 Ired., 576.

9. A court of law knows nothing of trusts, except so far as they are brought within its jurisdiction by statute. *Green v. Collins*, 6 Ired., 139.

10. The heirs at law, and much more, a mere wrongdoer, cannot at law dispute the title of a devisee in trust. *Smith v. Bryan*, 12 Ired., 11.

11. The position that a trustee cannot buy at his own sale must be taken with some qualifications. He may buy at his own sale and charge himself with the bid; and the *cestuis que trust* may, at their election, hold him bound by it, or may repudiate the sale and treat the property as still belonging to the trust fund. *Pitt v. Petway*, 12 Ired., 69.

See (Confiscation, 7.) (Deed—Deeds in trust.) (Ejectment—Of the title necessary to support the action, 65–77.) (Estoppel—

By matter other than by record or deed, 10.) (Possession, 31.)
(Tenants in common, 22.)

TURNPIKE COMPANY.

See (Indictment—When an indictment will lie, 54.)

UNLAWFUL ASSEMBLY.

See (Indictment—In what cases an indictment will lie, 36.)

UNWHOLESOME PROVISIONS.

See (Indictment—In what cases an indictment will lie, 20-44.)

USURY.

I. What transactions are usurious. | II. Of the action for the penalty.

NOTE.—The law in relation to usury has been greatly altered by an act ratified the 12th March, 1866, entitled "An act to establish the rate of interest, and repeal chapter 114 of the Revised Code, entitled Usury." It allows eight per cent. to be taken for the loan of money when it is expressly so stipulated, but if no rate be mentioned, the legal rate is to be still six per cent. The only forfeiture for a usurious loan is the loss of the interest.

I. WHAT TRANSACTIONS ARE USURIOUS.

1. Defendant had been awarded to pay plaintiff a certain sum of money, but at the day of payment, not having the money, he agreed to give the plaintiff more than six *per cent.* for indulgence; a bond was accordingly given for the principal sum, and the amount above the legal interest was paid partly in money and

by a note given for the balance. Upon an action on the bond, the transaction was held to be usurious, and the bond void. *Glisson v. Newton*, 1 Hay., 336, (385.)

2. The statute cannot be evaded by taking two securities, one for the principal, and another for the unlawful premium. *Ibid.*

3. Where A had a judgment and execution against B, and on the day of sale, consented to indulge him, in consideration of a sum more than the legal interest for the time of indulgence which was paid; *held* that this was usurious, and that A was *liable* to the penalty. *Carter v. Brand*, Conf. Rep., 28, (167.)

4. Where a debt was contracted in New York, by a person residing in this state, and he afterwards paid a part of it to the creditor's agent in this state, and for a forbearance of the balance, gave his note with interest calculated at seven *per cent.*, the New York rate, *it was held* that this note was not contrary to the usury law of this state. *McQueen v. B rms*, 1 Hawks, 476.

5. A person being embarrassed, and having a note payable to himself, endorsed and delivered it to his clerk, with instructions to raise money upon it by a sale of it to the plaintiff, but not to let the plaintiff know whose property it was. The clerk, representing it to be his own property, sold it to the plaintiff at a discount of $33\frac{1}{3}$ *per cent.* and endorsed it without recourse to himself. In a suit by the plaintiff against the payee of the note on his endorsement, *it was held* that as between those parties the transaction was in effect a loan upon usurious interest. *Ru v. Armstrong*, 2 Hawks, 411.

6. A being in want of money applied to B, and it was agreed between them that A should take from B the note of one L, which he held, and give therefor a bond payable to one S for the sum due on L's note, with 15 *per cent.* addition. This was done, and A's bond was endorsed by S to a brother of B, who sued on it and collected the amount by execution; *held* that B. was guilty of usury, and that it was no defence for a lender on usury to say, that he acted only as agent unless he disclosed the the agency at the time of the contract; and it was doubtful whether that would protect him. *Wilkes v. Coffield*, 3 Hawks, 28.

7. Although it may be usurious in an individual to take interest in advance upon a loan, it is not so in a bank discounting a negotiable security, even if payable directly to itself, because such a course in a bank is sanctioned by legislative and judicial determinations, and by the general understanding of the community. *State Bank v. Hunter*, 1 Dev., 100.

8. Discounting interest by a bank for the days of grace, upon securing a bond, is not usurious, though the obligor is not entitled to the days of grace, if the parties supposed that he was entitled on such an instrument. *Ibid.*

9. A bond, good between the parties, is valid in the hands of

an assignee who has discounted it at a higher than the legal rate of interest; and he may recover the full amount of the obligor, notwithstanding his claim through an usurious endorsement. *Collier v. Neville*, 3 Dev., 30.

10. There is a distinction between the usurious discount of perfect notes, on which an action can be maintained, and accommodation notes. In the first it is the purchase of an existing valid security, and the endorsee may recover on it; but in the second, the discount is in effect a loan to the maker, and the note is void by the statute. *Ibid.*

11. A mistake in the construction of the statute of usury, if it result in taking more than legal interest, will render the contract usurious; but an error in *fact*, by which more than the legal rate is reserved, will not vitiate the contract. *Ibid.*

12. If a security be usurious in its creation, it is void in the hands of an innocent holder; but if valid in its inception, a subsequent usurious agreement will not avoid it. *Ibid.*

13. A sheriff, who had collected money upon an execution and had neglected to pay it to the plaintiff, and was thereby subject to damages of twelve *per cent. per annum*, having lent the money thus collected to a third person at the same rate of interest, was held guilty of usury. *Dowell v. Vannoy*, 3 Dev., 43.

14. A pure contract of indemnity against a doubtful claim is not within the statute against usury; but an agreement, whereby the borrower agrees to pay the lender the same rate of interest which the latter is bound to pay to a third person and which exceeds the legal rate, is not a contract of indemnity within the rule; and this, whether the obligation of the lender be created by act of law or by stipulation. *Ibid.*

15. A deed of bargain and sale for land, made in trust to secure the payment of money borrowed upon usurious agreement, is an "assurance for the payment of money" denounced by the statute against usury, and is absolutely void; and a sale by the trustee to one purchasing even without notice of the usury will convey no title to the purchaser. *Shober v. Hauser*, 4 Dev. and Bat., 91. (Altered in favor of *bona fide* purchasers without notice; see Rev. Code, ch. 50, sec. 5.)

16. A requisition by the lender of the borrower, as a condition of a loan, that he shall take up notes held by the lender on an insolvent man, would be *per se* usury in law; and if the securing the doubtful debt formed any part of the lender's inducement, it raises a suspicion of an unlawful agreement for more than lawful interest upon the money lent, which calls for an explanation on the part of the lender. But if the doubtful notes would be good in the hands of the borrower, or if the maker had requested the borrower to take them up and he had agreed to do so, or if the lender believed *bona fide* the facts to be as

here supposed, then in truth, he did not intend to take a higher profit upon the sum lent than lawful interest, and the agreement would not be usurious. *Ibid.*

17. There is no instrument whatever, claiming to operate merely by the assent of the parties thereto, which may not be impeached at law for usury. Fines, feofments, grants, leases, although in form executed contracts, may be averred to have been executed as assurances or securities upon usurious agreements, and upon such averment being established, are as much avoided thereby as bonds, covenants, notes or other contracts, executory in their nature, are avoided by the plea of usury. *Ibid.*

18. The inability of the borrower to recover, from the lender, money actually paid upon usurious contract, does not result from the contract being voidable and not void. If it were voidable only, then by the payment he confirmed the contract, and could not recover the usurious excess, which he certainly may. The apparent creditor has no right to a cent of it; but he may, with a clear conscience, keep what was in conscience due him; and if the borrower has *voluntarily paid that*, then *volenti non fit injuria*. *Ibid.*

19. If the purchaser from the trustee in a deed to secure a usurious debt had required the borrower to join with the trustee in the conveyance, then he might have made title directly from the borrower, upon a new and distinct contract with him, and this contract being free from illegality, his title under it would have been valid. *Ibid.*

20. If a purchase be made *bona fide*, the debtor standing by and encouraging the sale, or by his silence practicing fraud upon the purchaser, though a court of law will be compelled to hold that no title passed, on account of the conveyance to the trustee being to secure an usurious debt, a court of equity is competent to remedy the mischief. *Ibid.*

21. Where, upon the endorsement of a note, the endorsee took more than six per cent. by way of discount, but the excess was small and was allowed by the endorser *expressly* for the trouble the endorsee would be at in travelling to make a demand upon the maker of the note, *it was held* that the transaction on its face was not so unreasonable as to warrant the court in declaring the endorsement to be usurious, but that it ought to have been left to the jury as a question of fact to say whether the allowance to the endorsee was intended *bona fide* as a remuneration for trouble, or was designed as a cover to hide an agreement for an excessive discount. *McKesson v. McDowell*, 4 Dev. and Bat., 120.

22. Where an endorsee takes a bill or note with the endorsement or guaranty of the endorser, and advances therefor less than the real value of the bill or note, the transaction is in effect

a loan between the endorsee and endorser, and is usurious as between those parties. *McElwee v. Collins*, 4 Dev. and Bat., 209.

23. There is a distinction between taking a bill or note and advancing money upon it, with an endorsement or guaranty, and one without. The last is a *purchase*, and may be for less than the real value, the other is a *loan*, and within the operation of the statute against usury. *Ibid.*

24. If a note be endorsed for the accommodation of the maker to enable him to raise money upon it, and he handed it to a bill broker, who gets it discounted at a greater rate than seven per cent. in New York, and hands the proceeds to the maker, the transaction will be usurious as between the endorser and endorsee; but if the endorsee pay the broker the full value upon discounting the note, the latter's withholding from the maker more than enough of the proceeds to cover his fair commission, will not make the transaction usurious, the endorsee in such case not being affected by the misconduct of the broker. *Long v. Gantley*, 4 Dev. and Bat., 313.

25. If, upon a mortgage of a slave, it is agreed that the mortgagee shall have the use of the slave in lieu of interest on the money advanced, it will not be usurious if that use do not exceed the legal rate of interest on the debt. *Joyner v. Vincent*, 4 Dev. and Bat., 512.

26. If, in a mortgage deed for a female slave, it is provided that the mortgagee shall have the increase of the slave, the transaction will not be usurious, though the increase exceed in value the legal rate of interest on the sum advanced, if the increase were not to rest in the mortgagee by reason, or on account, of the loan and forbearance, but were to become his in a different character, namely, as the donee of such increase; and parol evidence is admissible to prove the intended gift, for the purpose of repelling the imputation of a corrupt design to reserve usurious interest, whether it would be admissible or not to convert the apparent mortgage of the increase into a gift of them to the mortgagee of the matter. *Ibid.*

27. To avoid a security as usurious, you must show that the agreement was illegal from its origin. If the taking of usurious interest be cotemporaneous with the making of a bond, or if it be in the contemplation of the parties, the security will be void, although no usury appears on the face of it. *Rhodes v. Fullenwidder*, Ired., 415.

28. If a loan be made in silver, and the bond to secure it is, by a *bona fide* agreement, made payable in current bank notes, it is not usurious to include in the bond for such loan the difference in value between such notes and the silver loaned. *Ibid.*

29. Where a bank of this State agreed to lend, to an individual, notes of a Virginia bank, which were at a depreciation in the market, below both specie and the notes of the banks in this State,

and the borrower was to give his note at ninety days, to be discounted by the bank, and to be paid in specie or in the notes of the bank making the loan, *it was held* that the note given in pursuance of this agreement was void for usury, though the borrower stated at the time that he could make the Virginia notes answer his purpose in the payment of his debts to others. *Ehringhaus v. Ford*, 3 Ired., 522.

30. Usury consists in the unlawful gain beyond the rate of six *per cent.*, taken or reserved by the lender, and not in the actual or contingent loss sustained by the borrower. The proper subject of enquiry is, what the lender is to receive, and not always what the borrower is to pay, for the forbearance. *Ibid.*

31. Where A gave B an usurious bond for \$220, in consideration that B would discharge him from a previous *bona fide* debt of \$200, although this original debt is not affected by the subsequent usury, yet B cannot recover the \$200 upon the mere declaration of A to a third person, that he would pay that sum but would never pay the usurious bond. *Bost v. Smith*, 4 Ired., 68.

32. Every attempt by a bank to put upon a borrower bank bills, not its own, and below *par* at that time and place, is usurious, unless the bank, by its contract of loan, engage to make the notes as good as cash. *Bank of the State v. Ford*, 5 Ired., 692.

33. If a lease be made upon a usurious contract, the lease will not be avoided, but only the contract for the rent, so that if an action be brought for the rent, the plaintiff cannot recover, because the contract is in violation of the act against usury. *King v. Murray*, 6 Ired., 62.

34. Where a person takes a bond and includes in it usurious interest, it is *prima facie* evidence that he knew what he was about, that there was no mistake, and that he did it knowingly and, therefore, corruptly. If he rely upon there being a mistake in the calculation of interest, he must show it. *Dawson v. Taylor*, 6 Ired., 225.

35. Where A contracted for a piece of land at the price of \$1,000, and being unable to comply with the terms, directed the vendor to convey the legal title to B, which was done, and he afterwards leased the land to A for about \$100 *per annum*, agreeing that when A should repay him the purchase money, he would convey the land to A, *it was held* that there was no usury; at least none that could be reached at law. *Davis v. Cunningham*, 10 Ired., 156.

36. Persons may change notes for their mutual accommodation with a view to raise money by having them discounted, and they will respectively constitute a consideration, which will make them all binding on the makers; provided, however, that they be not made with a view to their being illegally discounted. But a note made to the intent of being illegally discounted for the accommodation of the maker, or the payee, or both of

them, would not be obligatory between the parties, and is void in the hands of one who discounts it at a rate exceeding six per cent.; and there is no difference between a man's making his own note to the lender, and his getting a friend to make a note to himself and passing that to the lender. *Simpson v. Fullenwider*, 12 Ired., 334.

37. Whether the lender was cognizant of the intention of the parties to the note, or not, is not material in a question of usury; for the statute has no provision in favor of the assignee, and it is the fact, and not the assignee's knowledge of it, which determines the validity of the instrument. *Ibid.*

38. In cases of usury, the question of a corrupt intent must be submitted to the jury. And it is error in the court to assume such intent from the fact that a bond for money borrowed sets forth a larger sum than the amount actually borrowed. *Kerr v. Davidson*, 13 Ired., 454.

39. A negotiable instrument made for the purpose of being sold at the best price, endorsed by the payee in furtherance of that object, and sold for cash by the agent of the maker, at a greater discount than six per cent., is usurious. *Bynum v. Rogers*, 4 Jones, 399.

40. It is not usurious for the endorsee of a note to take a new note from the maker at the end of six months, payable immediately, and including the accrued interest. *Holland v. Mosteller*, 6 Jones, 582.

41. Where a stock of merchandise was sold in this state, and a note taken therefor, payable in New York, where seven *per cent.* is the lawful rate of interest, *it was held* that, as there was no evidence of an intent to evade the statute, the transaction was not usurious. *Roberts v. McNeely*, 7 Jones, 506.

II. OF THE ACTION FOR THE PENALTY.

1. In action to recover the penalty for committing usury, it is not necessary that the principal money should have been paid; the offence being complete as soon as any thing is received for the forbearance over and above the rate of six per cent. per year. *Seawell v. Shomberger*, 2 Murph., 200.

2. Where an usurious agreement was made in this state, but the illegal interest was received in South Carolina, *held* that an action would not lie for the penalty. *Graham v. Lowrie*, N. C. Term R., 189, (622.)

3. When to an action *qui tam* on the statute of usury, the defendant pleaded the general issue, and, on the trial, moved for a non-suit, because the action was not brought in the county where the usury was committed, the motion was refused, because the matter should have been pleaded in abatement under the act of

1777. *Green v. Mangum*, 3 Murph., 39. (See Rev. Code, ch. 31, sec. 37.)

4. In debt *qui tam* for the penalty in usury, the plaintiff may recover less than he declares for, and the verdict shall be good. *Dozier v. Bray*, 2 Hawks, 57.

5. In an action for the penalty, payment of the usurious interest to the sheriff on an execution, or to an assignee, and much more to an agent, completes the offence. *Dowell v. Vannoy*, 3 Dev., 43. (Overruled as to payment to sheriff; see *Wright v. McGibbony*, 2 Dev. and Bat., 474.)

6. In debt for usury, the declaration stated a loan to A, but the proof was of a loan negotiated by A, as the avowed agent of B, *held* that the proof did not support the declaration, for the loan proved was in fact and in law a loan to B, and not to A. *Jones v. Canady*, 4 Dev., 86.

7. In questions of usury the real transactions may always be shown, as well to support as to avoid the security. *Ibid.*

8. A return by the sheriff of satisfaction upon an execution, issuing on a judgment for a debt infected with usury, is not sufficient evidence of the receipt by the lender of the usurious interest, to charge him in an action for the penalty. There must be proof that he *actually received* the usurious interest. *Wright v. McGibbony*, 2 Dev. and Bat., 474.

9. An action for the penalty in usury cannot be supported, unless the usurious interest, or some portion of it, has been actually received either in money or money's worth. *Stedman v. Bland*, 4 Ired., 296.

10. Where A lent money to B upon usurious interest, and, to secure the payment, B conveyed to a trustee a house and lot, worth more at the time than the money borrowed and the usurious interest; afterwards the property was sold by the trustee at public auction, and purchased by A, who gave for it what was then its fair value; but owing to the depreciation of the property, the sum for which it sold did not amount to the principal of A's debt; *it was held* that the action for the penalty could not be sustained. *Ibid.*

11. In an action *qui tam* for usury, where the count was that the defendant had corruptly taken on the 20th April, 1844, &c., usurious interest on a contract of forbearance, &c., from the 21st of April, 1843, to the said 20th day of April, 1844, and it appeared in fact that the usurious interest was taken for forbearance, &c., from the 21st of April, 1843, to the 21st of April, 1844; *it was held* that there was a fatal variance between the count and the proof, and therefore, the plaintiff could not recover. *Allen v. Ferguson*, 6 Ired., 17.

12. Although it is not necessary in a declaration for usury *qui tam*, as it is in a plea, to describe the usurious contract specially, but it may be done generally, yet the declaration must

be precise and accurate in the statement of the sum lent and forborne, the time of forbearance and the excess of interest; and these facts must be proved as laid. *Ibid.*

13. Under the statute of usury, the reservation of usurious interest makes the contract void, but it does not incur a forfeiture. The forfeiture is incurred only by taking usurious interest as such. *Godfrey v. Leigh*, 6 Ired., 390.

14. Although there be a corrupt agreement for excessive interest when the money is advanced, yet no action lies for the penalty, until some illegal interest has been received. So, on the other hand, if the contract were not for excessive interest, but the lender afterwards takes it, he forfeits double the sum lent. *Ibid.*

15. If a bond be given upon an usurious consideration, and a new bond of the borrower is afterwards substituted for it, the offence is not committed, so as to subject the lender to the penalty, until the second bond is paid. But where the debtor does not give his bond merely as a security, but gives that of another person, payable to him and belonging to him, in payment, and it is accepted as a payment, it is a payment in law; for a payment in money's worth, received as a payment, is considered in law to be the same as a payment in cash. *Ibid.*

16. A contract for usurious interest may be laid, in a declaration for the penalty, as of the day when the illegal interest was paid. *Ibid.*

17. When an usurious loan is made to A as the avowed agent and for the benefit of B, the declaration must state the loan as made to B. *Jones v. Herndon*, 7 Ired., 79.

18. Though, in a declaration for usury, it is proper that some day should be stated as the day of payment of the usurious interest, yet it is not necessary to set forth the true day of payment, inasmuch as it is immaterial when the usurious interest was paid, if before the commencement of the action. It is only necessary to set forth truly the time, for which the forbearance was stipulated in the contract of loan. *Ibid.*

19. When a person lent \$800 at a premium of \$80 beyond the lawful interest, and afterwards took the borrower's bond for \$932, being the principal and interest on the \$800 lent and another bond for \$93, the principal and interest on the premium, and in a declaration for the penalty, this \$93 was alleged to be the usurious interest on a loan of \$932, it was held that the declaration was not supported by the proof, as the loan was only \$800, and the usurious interest was reserved on that. *Pipkin v. Bond*, 7 Ired., 118.

20. Where, upon an usurious contract, the lender receives from his debtor, in payment of the principal and the usurious interest, the note of a third person, he makes himself liable to the

penalty for usury, in the same manner as if he had received payment in money. *Cavaness v. Troy*, 10 Ired., 315.

21. In the action for the penalty for taking usury, if the time of forbearance is stated to be from the 31st of March to the 1st day of April in the same year, and the proof is that it was from the 15th March to the 1st of April ensuing, the variance is fatal to the action. *Taylor v. Cobb*, 3 Jones, 138.

22. In a *qui tam* action for usury, where the agreement for forbearance was "twelve months," it was held that calendar, and not lunar, months were meant. *Satterwhite v. Burwell*, 6 Jones, 92.

VENDOR AND PURCHASER.

1. The circumstance that the vendor of a house and lot was informed before the completion of the contract, that the purchaser intended the place as a residence for his kept mistress, does not vitiate the contract of purchase. *Armfield v. Tate*, 7 Ired., 258.

2. The law does not annex as a condition to the purchase of land, that the title deeds shall be given before a suit can be brought upon a note given for the purchase money. *Ibid.*

3. In general, a vendor of land is bound to prepare the conveyance and tender it, or offer to do so, but where, from the nature of the contract it appears that those to whom the title was to be made were unknown to the vendor, but known to him who made the purchase, the latter is bound to give the necessary information to the vendor, or, if he fail, to pay the price contracted for. *Christian v. Nixon*, 11 Ired., 1.

4. A vendee, by contract for the sale of a tract of land, can maintain an action upon the bond for title, without having made a payment or tender of the whole of the purchase money, when, by a sale of the property, it is put out of the power of the vendor to make the conveyance, at the time the vendee has a right to call for it; and it makes no difference, whether the vendor himself has made the conveyance, or whether it has been made by a sheriff under process of law. *Nichols v. Freeman*, 11 Ired., 99.

5. In such a case as that above stated, the measure of damage is the difference between the real value of the property at the time of the breach, and the amount of the purchase money remaining unpaid. *Ibid.*

6. Where the vendor and purchaser of a tract of land entered into a covenant that the latter should pay the price on or before a specified day, and that the vendor should make title "when-

ever" the money was paid, *it was held* that the vendor, in a suit for the purchase money, was bound to aver and prove his readiness and ability to make title on the day set for the payment of the money. *Hardy v. McKesson*, 6 Jones, 554.

7. A covenant by a vendor to make a good and sufficient title in fee simple to a tract of land, "in which the metes and boundaries of the said land shall be fully and fairly set out," is not complied with, on the part of the vendor, by the tender of a deed describing a large tract of land by metes and bounds, and excepting five small parcels, which are not described except by the number of acres contained, and the names of the owners. *Hardy v. McKesson*, 7 Jones, 567.

8. Upon a covenant in general terms that the vendor shall make a good and sufficient title in fee simple at a specified time, when the vendee is to pay the purchase money, *it was held* to be the duty of the vendor to prepare the deed and have it ready when he demands the purchase money. *Ibid.*

VESSELS.

1. When a vessel is lost, the master does not thereby lose his wages. *Ferguson v. Fitt*, 1 Hay., 239, (274.)

2. But in such a case, the seamen lose their wages from the last port of delivery. *Ibid.*

3. An owner of a vessel is liable for the contract of his captain. But if he part with the management and control of his vessel, upon a contract to receive a part of the earnings of the vessel, he is discharged from his liability, unless he himself make the contract for taking in a cargo on freight. *Howard v. Ross*, 2 Hay., 333, (508.)

4. Taking a full price and stowing upon deck will subject the owner of a vessel to pay damages, if what is placed on deck be thereby lost or damaged; but if that did not occasion the loss, he will be no more liable for that part of the cargo, than for the rest of it. *Gardner v. Smallwood*, 2 Hay., 349, (534.)

5. If a bill of lading be not stamped, parol evidence may be given of the contract to carry the goods. *Miller v. Ireland*, Tay., 308, (134.)

6. A, being the owner of a vessel lately completely repaired, took corn on board as freight. The rudder, which was externally sound, but internally unsound without the knowledge of A, was broken by the sea, whereby the vessel was wrecked and the corn lost. *Held* that A was liable for the loss of the corn. *Backhouse v. Sneed*, 1 Murph., 173.

7. A *pro rata* freight may be recovered from the shipper, if he abandon the goods to the underwriter after the voyage is broken up by the stranding of the vessel. *VanNooden v. Littlejohn*, N. C. Term R., 16, (457.)

8. The master of a vessel is liable upon the bill of lading signed by him, though the goods are damaged by the unskillfulness of the pilot. *Harvey v. Pike*, N. C. Term R., 82, (519.)

9. The shipper may sue either the master or owner upon a bill of lading. *Ibid.*

10. Where a shipper agreed to load a vessel "in a reasonable time," it was held that he was bound to pay for every unreasonable delay that occurred; and the fact of his residing at a distance from the shipping port made no difference in the obligation created by the articles of agreement. *Wade v. Russell*, 1 Dev. and Bat., 542.

11. Where goods are shipped on board of a vessel, to be carried for freight, the master of the vessel, on his arrival at the port of delivery, has a right to retain the goods until the freight is paid by the consignee. But yet if he deliver the goods to the consignee, without receiving the freight, the shipper of the goods, if he be also the owner, and the consignee merely his agent, is liable for the freight, notwithstanding the common clause in the bill of lading, "to be delivered to the consignee or his assigns, he or they paying freight for the same." *Spencer v. White*, 1 Ired., 236.

12. Generally, a consignee, by receiving the goods, became liable for the freight. But it seems that it is not so where he is only the agent of the consignor, and the fact is known to the master. *Ibid.*

13. In an action of trespass on the case against the owner of a vessel for his *tort* in not delivering a cargo entrusted to him, an alteration by the plaintiff in the bill of lading, in which there was a mistake, will not affect his right to recover. *Benbury v. Hathaway*, 6 Ired., 303.

14. A having chartered a vessel which he commanded, B loaded her with a cargo for sale in the West Indies, which he insured and consigned to A, and furnished supplies for the voyage, A agreeing out of the proceeds of the sale to pay B the cost of the cargo and the bill for supplies, with five *per cent.* thereon, and to retain the residue, if any, as freight. It was held that A had no interest in the cargo, and, therefore, it was not liable to be seized under a *fi. fa.* against him. *Griffin v. Williams*, Busb., 292.

VOTING AT AN ELECTION.

See (Indictment—When an indictment will lie, 77–84–100.)

WAGER.

See (Gaming.) (All wagers, or gaming or betting contracts, and all judgments, conveyances and assurances for and an account of the same are now made void. Rev. Code, ch. 51, sec. 1.)

WAGER OF LAW.

The doctrine of the wager of law has never been in force in the State of North Carolina. *Daniel v. Cobb*, Mar. 77, (80.)

WARDENS OF THE POOR.

See (Indictment—When an indictment will lie, 83.)

WARRANTY.

I. Warranty of real estate.
II. Warranty of personal property.

III. Of the action upon a warranty, and the evidence to support it.
IV. Of the damages to be recovered.

I. OF REAL ESTATE.

1. It is only in common law conveyances that certain words imply a warranty, and in such, it is the word "give" only that implies a warranty. But in the deed of bargain and sale the words "give, grant, bargain, sell," &c., do not imply a warranty of title; nor do the words of a deed, describing the length of lines, boundaries, &c., and concluding with the words "containing so many acres," import a warranty of quantity. *Rickets v. Dickens*, 1 Murph., 343. S. C. 1 Car. L. R., 77, (11.) S. P. *Powell v. Lyles*, 1 Murph., 348.

2. An action of covenant will lie upon the words of a deed, "will warrant and defend the premises to A. B. and his heirs forever;" and this from necessity, as otherwise a vendor would be without a remedy in many cases, for the writ of *warrantia chartæ* is not in use in this state, nor are real actions in which voucher is used. *Ibid.*

3. An alienation in fee by a tenant in tail with a clause, "that he for himself, his heirs, executors, &c., doth covenant and agree the premises to him, the said A. B., his heirs and assigns, against the lawful claims or demands of any persons whatsoever, forever to warrant, secure and defend," does not work a discontinuance of the estate tail, for the covenant is not a covenant real, annexed to the land, whereby the alienor and his heirs are bound to yield other lands of equal value in case the alienee be evicted; but is a personal covenant for quiet enjoyment, the breach of which is to be repaired in money damages, and not in land, although the alienor may, upon his death, have left real assets. *Jacocks v. Gilliam*, 3 Murph., 47. *S. P. Gilliam v. Jacocks*, 4 Hawks, 310.

4. Where A and B, having an interest in common with three others, executed a deed of bargain and sale for lands, in *their own names*, professing in said deed to act as well for themselves as their co-tenants, but acknowledging the payment of the purchase money, transferring the title and warranting it, all "as attorneys as aforesaid," it was held in an action of covenant on the warranty, that the title of the co-tenants did not pass, because the deed was not signed in their names; that the interest of those who executed the instrument did not pass, because the deed did not show any consideration paid to them in their own right, but only as attorneys for others; and that the warranty could not be considered as a *personal* or independent covenant, but that, as no estate passed, the warranty was not binding. *Locke v. Alexander*, 2 Hawks, 155.

5. A covenant "to warrant and defend the right, title and property to land against the lawful claims of any persons whatsoever," is not a covenant of seisin; and, therefore, an action will not lie for want of title in the covenantor to the land at the time he conveyed it, nor until some claim has been made, or the covenantee otherwise disturbed in his possession. *Woodard v. Ramsey*, 2 Hawks, 335.

6. It seems that a recital in a deed, purporting to convey a fee, from which it appears that a vendor has but an estate for life, but which was intended only to describe the land conveyed, does not qualify a covenant of quiet enjoyment, so as to confine it to the life of the vendor. *Coble v. Wellborn*, 2 Dev., 388.

7. Where one who has an estate of inheritance in possession, as, for instance, a fee conditional, the condition being that if he died without leaving issue living at his death the estate should go over, sells the same, binding himself and his heirs in a

general warranty, his heirs are bound, whether the warranty be lineal or collateral, and whether they have assets by descent or not. *Flynn v. Williams*, 1 Ired., 509.

8. A warranty by a tenant for life is void against all persons claiming in remainder or reversion; and so are collateral warranties by an ancestor, as against his heirs at law, the ancestor having no estate of inheritance in possession. *Borden v. Thomas*, 6 Ired., 209.

9. A general warranty contained in a deed of bargain and sale, made by tenant by the curtesy of his wife's land in fee, will not rebut the right of the heir of the wife. *Johnson v. Bradley*, 9 Ired., 363.

10. A by deed conveyed to R. S. a tract of land by metes and bounds, specifying the number of acres, and covenanted as follows: "To have and to hold to him, the said R. S., his heirs and assigns; the right and title of the same I warrant and will ever defend." *It was held* that this was only a covenant for quiet enjoyment, and not a warranty as to the number of acres mentioned in the deed. *Huntley v. Waddell*, 12 Ired., 32.

11. In the sale of land by deed, there are no implied warranties. *Ibid.*

12. Where a son, who had taken only a life estate under his father's will, sold and conveyed the land with warranty in fee, the warranty was held not to bar nor rebut one who claimed as a purchaser. *Moore v. Parker*, 12 Ired., 123.

13. Where a deed for land, after setting forth the parties, the description of the land and the interest conveyed, added as follows: "To have and to hold the above described piece or parcel of land, free and clear from me, my heirs, executors and administrators and assigns, and from all other persons whatsoever, unto the said," &c; *it was held* that this clause contained a covenant for quiet enjoyment. *Midgett v. Brooks*, 12 Ired., 145.

14. No precise or technical language is required by law, in which a covenant shall be worded; any words, which amount to, or import an agreement, being under seal, are sufficient. *Ibid.*

15. A covenant of warranty, annexed to an estate in land, determines with the estate to which it is annexed. But when one takes a conveyance in fee with covenants of warranty, from a husband and wife, and the title of the wife does not pass, in consequence of the want of her privy examination, yet the bargainee takes an estate in fee as to all the world, except the wife, and those claiming under her, not barred by the statute of limitations. *Lewis v. Cook*, 13 Ired., 193.

16. An estate is *determined*, only when it *expires by its own limitation*, and when the limitation is in fee, the covenants of warranty run with it, and may be sued on by the bargainee and

his assignees, whenever they are evicted by a title paramount. *Ibid.*

17. When a man purchases at a sheriff's sale under execution the estate which another professes to have in fee to certain lands, to which covenants in warranty are annexed, he acquires, as incidental to the estate, the right to those covenants. *Ibid.*

18. Where covenants of warranty, which run with the land, are contained in a conveyance purporting to be in fee, the tenant in fee in possession cannot, by any assignment, sever the covenants, so as to make them independent of the estate. They are incidents which cannot be disannexed from their principal. *Ibid.*

19. Where A, who had a fee simple, defeasible in the event of his dying without issue living at his death, conveyed the land in fee with general warranty to B, and afterwards died without issue, *it was held* that the collateral warranty barred his heirs and those claiming under him. *Spruill v. Leary*, 13 Ired., 225. (Overruled by *Myers v. Craig*, Busb., 169.)

20. The taker of the first fee, under a conditional limitation or executory devise, by which a fee is limited after a fee, cannot by bargain and sale with warranty bar the taker of the second fee (the taker of such second fee being his heir at law,) without assets descended. *Myers v. Craig*, Busb., 169.

21. Where the devise was to four sons, A, B, C and D, "and if one or more of them die leaving no lawful heir, the property shall belong to those of the four whose names are above written," and A conveyed in fee with general warranty, and died without issue, *it was held* that his warranty did not bind his brothers, who were his heirs at law, without assets descended. *Ibid.*

22. A covenant for the quiet enjoyment of land is broken, if the covenatee be entered upon and dispossessed by a person having a superior title, though such entry and dispossession was not under process. *Parker v. Dunn*, 2 Jones 203.

23. A warranty in a deed is only coextensive with the estate to which it is annexed, and when the estate ceases the warranty will also cease. *Register v. Rowell*, 3 Jones, 312.

24. A covenant of quiet enjoyment, inserted in a deed made by an administrator under the act of 1797, Rev. Code, ch. 46, sec. 37, does not bind the estate of his intestate, and no suit can be maintained on it against him in his representative capacity. *Osborne v. McMillan*, 5 Jones, 109.

25. Where a vendee brought an action against an intruder and failed to recover, but not on account of a defect in the vendor's title, which was good, *it was held*, in an action on a covenant for quiet enjoyment, that this did not amount to a breach of the covenant. *Wilder v. Ireland*, 8 Jones, 85.

26. A covenant for quiet enjoyment in a deed conveying the

fee is not broken during the life estate which the covenantor had, though the title might be bad as to the remainder of the estate. *Ibid.*

27. The withholding by the covenantor of his title deed (which had not been registered,) at the trial of the suit by the vendee against an intruder, was no breach of the covenant for quiet enjoyment. *Ibid.*

28. Where a grantor of land in another state entered into a covenant of quiet enjoyment, and after his death his widow recovered of the grantee a sum certain which had been given to her in lieu of dower, to which, according to the law of that state, she was entitled, *it was held* that such recovery was an eviction, and the grantee was entitled to recover the amount paid. *Jackson v. Hanna*, 8 Jones, 188.

29. In an action on a covenant for quiet enjoyment, it is no defence that the covenantor had a life estate in the land at the time of making the deed, if such life estate has fallen in, and the covenantee has been evicted by title paramount. *Parker v. Richardson*, 8 Jones, 452.

See (Executors and Administrators—Of sales by executors and administrators, and herein of purchases by them at their own sales, 10.) (Jurisdiction—Of the county and superior courts, 44.)

II. OF PERSONAL PROPERTY.

1. *Caveat emptor* applies, when a man purchases an article of personal property not in the vendor's possession; he ought to require a warranty. *Galbraith v. White*, 1 Hay., 464, (535.)

2. It also applies, when the thing sold has some defect discoverable by ordinary inspection. *Ibid.*

3. It does not apply when the defect is not so discoverable; and when the vendor of an unsound horse, whose disorder is not known, receives a full price, there is an implied warranty of soundness. *Ibid.* *S. P. Toris v. Long, Tay.*, 17, (13.) (Overruled by *Erwin v. Maxwell*, 3 Murph., 241.)

4. The vendor of goods is liable for affirming at the time of the sale that the goods possess a quality which would increase their value, if it turn out that they do not possess this quality, though he did not know that the affirmation was false. *Thompson v. Tate*, 1 Murph., 97.

5. An express warranty excludes an implied one. In the contract of sale the law implies no warranty as to the quality of the goods sold, though it may imply a warranty of title, where the vendor is in possession at the time of the sale. *Lanier v. Auld*, 1 Murph., 138.

6. Where one sold a slave "about eleven years of age, sound and healthy, and do by these presents further covenant and agree

to warrant the right," &c., *it was held* to amount to a warranty of soundness. *Gilchrist v. Marrow*, 2 Car., L. R., 607, (410.)

7. An affirmation of soundness, made *after* the sale of a personal chattel cannot be binding as a warranty; and to be so, if made at the sale, it must appear to have been intended as a warranty, and not a mere matter of opinion or judgment. *Erwin v. Maxwell*, 3 Murph., 241.

8. These words in a conveyance of slaves: "all the above named negroes are sound, healthy, clear of disease, and slaves for life, and warranted and defended from all manner of claims whatever:" contain not only a warranty of title, but also a warranty of soundness sufficient to support an action. *Ayres v. Parks*, 3 Hawks, 59.

9. An affirmation does not amount to a warranty of soundness, unless it appear from the evidence to have been so intended; but an affirmation by a person in possession of a chattel, that it is his own, will make a warranty, and even without such affirmation the law will imply a warranty of title. *Inge v. Bond*, 3 Hawks, 101.

10. In the sale of a chattel, neither the words "warrant and defend," nor the words "warrant to be good, sound property and healthy," constitute a covenant of title. The first are for quiet enjoyment, and the last apply to the state and quality of the article sold. *Cowan v. Silliman*, 4 Dev., 46.

11. To make an affirmation at time of the sale of a chattel a warranty, it must appear upon evidence to have been so intended, and not be a mere matter of opinion or judgment. *Baum v. Stevens*, 2 Ired., 411.

12. Whether an affirmation in a parol contract of sale amounts to a warranty, is a matter of fact to be left to the jury, with proper instructions from the court. *Ibid.*

13. In an action for a breach of a warranty that a slave is of "sound mind," it is not necessary for the plaintiff to show that the slave was an idiot or a lunatic at the time of the warranty. It is sufficient to show that he had been a lunatic, though in a lucid interval at the time of the warranty, and his insanity afterwards returned; or to show that he was of so weak an understanding and possessed so dim a reason, as to be unable to comprehend the ordinary duties of a slave and perform them with the expertness that is common to his class. *Sloan v. Williford*, 3 Ired., 307.

14. An affirmation at the time of the sale of personal property is a warranty, if it appear from the evidence that the defendant did not mean merely to express an opinion, but to assert positively the soundness of the article sold, and that bidders should, upon the faith of that assertion, bid for the article as sound; otherwise it is not a warranty; and what was the intention is a

matter of fact to be left to the jury. *Foggart v. Blackwelder*, 4 Ired., 238.

15. An implied warranty of title cannot extend to defects which are visible and alike within the knowledge of the vendee and vendor, or when the sources of information are alike open and accessible to each party. *Hudgins v. Perry*, 7 Ired., 102.

16. In an action on a verbal agreement alleged to contain a warranty, it is competent for the jury to decide, whether the word "warrant" was used by the vendor, merely as a word of high commendation of the subject of the trade, or whether it was intended to import that the vendor would be liable in damages, if the thing sold should not answer the description. *Starnes v. Erwin*, 10 Ired., 226.

17. No warranty of *quality* is implied in the sale of goods. *Dickson v. Jordan*, 11 Ired., 166.

18. If a vendor sell articles, apparently of the kind ordered by the purchaser, though he has no opportunity of testing the quality of the goods until he has used them, yet if there be no fraud on the part of the vendor, the purchaser must bear the loss, if it turn out that there is a defect in the articles. *Ibid.*

19. One may recover in an action of covenant or assumpsit, on a bill of sale for a slave, for a warranty of the soundness of the slave, although there be no witness to the bill of sale. *Maxwell v. Miller*, 11 Ired., 272.

20. In the sale of a slave, a warranty of soundness includes soundness of the mind as well as of body. And soundness of mind means such a degree of mental capacity, as renders him fit to perform the ordinary duties of a slave. *Simpson v. McKay*, 12 Ired., 141.

21. A warranty of the soundness of a slave includes in it a stipulation that there is no defect in an eye so as to make it unfit for ordinary purposes, and, therefore, if the slave is near sighted, there is a breach of the warranty. *Bell v. Jeffreys*, 13 Ired., 356.

22. Whether an affirmation of the qualities of a chattel sold amounts to a warranty of soundness, is a question of intention and must be left to the jury. *Henson v. King*, 3 Jones, 419.

23. A warranty on the sale of a soda fountain that it was then in "good condition" is broken, if from an inherent defect in its construction existing at the time of the sale, it was liable to get out of order from time to time, and from that cause failed to answer the purposes for which it was designed, although it was in a condition to make good soda water on the day of sale; and the measure of damage, in such case, is the difference in the value of the article, provided it had been in good condition, and its value as it then was. *Pritchard v. Fox*, 4 Jones, 140.

24. A warranty that a slave "is sound in mind and health," is not broken by the existence of a contraction of the title finger

of each hand, though it diminishes the usefulness and value of the slave. *Harrell v. Norvill*, 5 Jones, 29.

25. A diseased liver, accompanied with dropsical symptoms, and a swollen abdomen existing at the time of the sale, which impaired the value of the slave sold, whether the disease was chronic or temporary, amount to a breach of a warranty of soundness. *McLean v. Waddell*, 5 Jones, 137.

26. A bill of sale of a slave, which contains a warranty of soundness, but which is inoperative to convey the title for the want of a subscribing witness, may nevertheless, be read as evidence of the warranty, provide an actual sale and delivery be proven *dehors*. *Hussey v. Weathersby*, 6 Jones, 387.

27. Upon a doubtful question of fact whether there was or was not a warranty of the soundness of a slave, *it was held* to be error in the judge to instruct the jury, that it was not a matter to be considered that the defendant was acting as executor. *Drake v. Bains*, 8 Jones, 122.

See (Joint Tenants, 4.)

III. OF THE ACTION UPON A WARRANTY, AND THE EVIDENCE TO SUPPORT IT.

1. A covenant "to warrant and defend the negro Peter to be a slave," is a covenant only against a superior title; it does not bind the warrantor on receiving notice from the warrantee that a suit is brought to ascertain whether Peter is free, to come forward and make defence and put a stop to the eviction. He is bound to make defence only when he is sued upon his covenant, and then, if he can show that Peter was a slave at the time of the sale, he shall not be answerable. *Shober v. Robinson*, 2 Murph., 33.

2. The record of the proceedings in a suit brought by Peter against the purchaser, in which it was found that Peter was free, is not conclusive against the warrantor, although he had notice of the suit, but is only evidence to prove that the plaintiff was evicted. *Ibid.*

3. In an action of covenant for quiet enjoyment, a recovery of damages in trespass *quare clausum fregit* is sufficient evidence to show a breach. The judgment in such action, however, is not conclusive against the warrantor, as to the title to the land. *Williams v. Shaw*, N. C. Term, R., 197, (630.) S. P., *Coble v. Wellborn*, 2 Dev., 388.

4. The disuse of real actions has, from necessity, given to the warrantee a right to bring an action of covenant, in which he recovers damages according to the value of the land at the time the warranty was entered into. If he could not bring this action he would be without remedy; but the same necessity does not exist for rebutting the heir; for if the ancestor have left real or

personal assets, the purchaser may be recompensed. *Jacocks v. Gilliam*, 3 Murph., 47.

5. A covenant of general warranty is subject to the same construction that a covenant for quiet enjoyment is; and when the *habendum* in a deed is to a man and his heirs forever, he may recover for an eviction on such general warranty, though the clause of warranty should not mention to whose benefit it enures; for it shall be to the benefit of the person to whom the conveyance is made. *Herrin v. McEntire*, 1 Hawks, 410.

6. In an action on a covenant of general warranty, it is essential for the plaintiff to assign as a breach, and to prove, an ouster, or eviction by a paramount legal title. *Ibid.*

7. A purchases a tract of land of B with warranty, and sells with warranty to C, who is evicted by a better title. As soon as this fact is ascertained, A may make compensation to C, and sue his own vendor B, without waiting for a recovery at law by C against him. *Ibid.*

8. A decree in equity, directing a defendant to execute a deed and deliver possession of land, is a breach of the covenant for quiet enjoyment, and the fact that the decree is founded on notice to him, when he purchased an equity in the land, does not bar his action. *Martin v. Martin*, 1 Dev., 413.

9. A covenant of seisin is broken, if the vendor have no right to sell all the land within the boundaries of his deed. *Wilson v. Forbes*, 2 Dev., 30.

10. An actual eviction, upon a paramount title, is indispensable to sustain an action upon a covenant of quiet enjoyment; therefore, where there had been a recovery in ejectment upon a paramount title, and, before the issuing of the writ of possession, or any actual disturbance of his possession, the defendant in the ejectment purchased the land from the plaintiff, *it was held* that there was no breach of the covenant for quiet enjoyment. *Coble v. Wellborn*, 2 Dev., 388.

11. The existence of a better title, accompanied with actual possession, is a breach of a covenant of quiet enjoyment in a deed executed after the possession commenced under that title; and the bargainee need not bring an action of ejectment in order to entitle him to recover. *Grist v. Hodges*, 3 Dev., 198.

12. Where the vendee is evicted in his life time, an action for the breach of the covenant of quiet enjoyment is properly brought, after his death, by his executor. *Ibid.*

13. A covenant for quiet possession is not broken by a mere demand of possession by one having title. *Cowan v. Silliman*, 4 Dev., 46.

14. A covenant for quiet enjoyment runs with the land, and one who is evicted may recover upon such covenant in the deed against any prior vendor; and this, whether he purchased with, or without warranty. *Markland v. Crump*, 1 Dev. and Bat., 94.

15. An intermediate vendor cannot, in respect of his liability upon his covenant for quiet enjoyment, recover of a prior vendor, but must first make good the damages of the person evicted. *Ibid.*

16. The right of a vendor, who sells with warranty, to retain the title papers, does not give him the right to sue primarily for the eviction of his vendee. *Ibid.*

17. Privity of contract will not alone suffice to sustain an action upon a covenant running with the land, but the plaintiff must show a damage to himself in particular from the breach alleged. *Ibid.*

18. In an action for the breach of a covenant for quiet enjoyment, the record of a recovery in ejectment by a third person against the vendee, effected after notice to the vendor of the pendency of the action of ejectment, is not conclusive nor, it seems, any evidence against the vendor, of the superior title of such person. *Martin v. Cowles*, 2 Dev. and Bat., 101.

19. Where, in a bill of sale, there was the following covenant: "which said negro I do hereby warrant and defend forever to the said J. H., his heirs and assigns forever," and after the death of J. H., the value of said negro was recovered from his administrator in an action of trover, by one having a better title than the vendor, *it was held* that such recovery in trover amounted to an eviction, and, therefore, the covenant was broken; and *it was held* also, that the administrator of J. H. could support an action, as such, to recover damages for such breach, though the covenant was not broken until after J. H.'s death, and although the action of trover was brought against him personally, he having possession of the slave as administrator. *Lee v. Gause*, 2 Ired., 440.

20. The bargainee of land, having been sued in ejectment and a recovery had against him, voluntarily left the possession, and it not appearing that possession had been taken under the recovery, *it was held* that there was no proof of an eviction, to sustain an action on a covenant for quiet enjoyment. *Hagler v. Simpson*, Busb., 384.

IV. OF THE DAMAGES TO BE RECOVERED.

1. Upon an eviction, the seller of land warranted is liable only to the original value at the time of sale, and not to the increased value from improvements or otherwise. *Phillips v. Smith*, 1 Car. L. R. 475, (87.)

2. Where a man conveys several tracts of land by one deed, and covenants against a better title, on eviction of the vendee out of one of the tracts by a superior title, the rule of assessing damages is, that the whole of the tracts are to be valued in gross, at the price paid for them by the vendee; and then the

relative value of tract lost to the value of the whole is to be ascertained; and the amount of this relative value, with interest thereon, is the amount of damages which the vendee is entitled to recover. *Dickens v. Sheppard*, 3 Murph., 526.

3. In covenant for a breach of warranty *mesne* profits, during the enjoyment under a defective title, cannot be set off against the claim of interest on the purchase money. But where it appears that the possessor has enjoyed the lands and cannot be called to account for the *mesne* profits, the reason of the rule ceases, and it does not apply. *Locke v. Alexander*, 1 Hawks, 412.

4. The measure of damages upon a covenant of seizen is ordinarily the price paid for the land and the interest upon it. But if the vendee go into possession under the deed only, and his title become perfect by the statute of limitations, he will be entitled to only nominal damages for a breach of a covenant of seizin. *Wilson v. Forbes*, 2 Dev., 30, *S. P. Cowan v. Silliman*, 4 Dev., 46.

5. In an action for the breach of the covenant of quiet enjoyment, the measure of damages, when there is an eviction from the whole estate, is the purchase money paid by the vendee; but when the eviction is of only part of the fee, as of an estate for life, there has not been as yet any rule established. *Williams v. Beeman*, 2 Dev., 483.

6. Whether interest upon the purchase money can be recovered depends upon the circumstances of each case. Ordinarily it is given, when the vendee is liable to the rightful owner for the profits; but when not so liable, the profits are set off against it. *Ibid.*

7. A vendee, who has been evicted by paramount title, can, from his privity of estate, recover on a covenant made to his vendor by the person who sold to him. But in such case, where the intermediate vendee sold at a less price than he gave, *it was held* that his vendee could recover of the original vendor only purchase money paid by him. *Ibid.*

8. Whatever may be the rule of damages upon an eviction from a particular estate, after the expiration of a part, yet where the deed conveys a life estate, and the whole interest was lost without any enjoyment by the vendee, he is entitled to recover his purchase money and interest. *Grist v. Hodges*, 3 Dev., 198.

9. Where, in an action for a breach of a warranty of the soundness of a slave, it appeared that he had taken the infection of the small pox, of which disease he soon afterwards died, *it was held* that the jury might properly give as damages, under the instructions of the court, the price paid for the slave with the interest thereon to the time of the trial, the slave having been a total loss, and there being no evidence that the price paid was not his market value. *Williamson v. Canaday*, 3 Ired., 349.

10. In an action for a breach of covenant in a warranty of the

soundness of a slave, the plaintiff may show what the slave afterwards sold for, to aid the jury in estimating the damages. *Houston v. Starnes*, 12 Ired. 313.

11. Where a grantee sued on a covenant for quiet enjoyment, made on the sale of land in another state, on account of a recovery from him, by the widow of the grantor, of a certain sum assessed on the land by the law of that state for her dower, and it appeared that only a part of the recovery was paid when the suit was brought, but the remainder was paid before the trial, *it was held* that the grantee was entitled to recover the whole sum. *Jackson v. Hanna*, 8 Jones, 188.

WASTE.

1. The action of waste will lie in North Carolina. *Ballentine v. Payner*, 2 Hay., 110, (268.) S. P., *Bright v. Wilson*, Conf. Rep., 24, (163.)

2. The county court has jurisdiction of the action. A view is requisite only when the court thinks proper to order it. *Ibid.*

3. Waste in this State is the unnecessary cutting and selling or destroying timber above what is necessary for fuel, fencing, plantation utensils, and the like; but as to juniper swamps and similar lands, the widow or devisee for life may make the ordinary use of it, by getting shingles, without being guilty of waste. *Ibid.*

4. Cutting timber trees for the purpose of clearing the land is not waste here as it is in England. If the timber be cut for sale and not to clear the land, it will be waste. *Ward v. Sheppard*, 2 Hay., 283, (461.)

5. It is waste to cut down timber for sale, or to make tar out of lightwood on the land; but it is not waste to destroy timber in clearing land for cultivation, or to cut it for the purpose of repairing buildings, fences and plantation utensils. *Parkins v. Cox*, 2 Hay., 339, (517.)

6. That only is to be considered waste, which is *substantially* an injury to the inheritance; and if the damages found by the jury be insignificant, the judgment must be arrested. *Sheppard v. Sheppard*, 2 Hay., 382, (580.)

7. It is not error for the judgment in an action of waste to be for the damages only, and not also for the place wasted. *Bright v. Wilson*, Conf. Rep., 24, (163.)

8. The writ of waste is founded upon principles peculiar to itself, and more especially dependent upon a privity between the reversioner and tenant. No one shall have the action, unless he

hath the immediate estate of inheritance, and between the heir of the reversioner and the tenant who commits waste there is no privity, the waste having been committed in the lifetime of the reversioner. *Browne v. Blick*, 3 Murph., 511.

9. A widow is guilty of waste, if she make turpentine upon land assigned to her in dower, which in her husband's lifetime had not been used for that purpose. But she may rightfully use, in the ordinary way of making turpentine, trees that have been boxed or tended for turpentine in his lifetime; and she may box new trees, as those already boxed become unfit for use, so as not to enlarge the crop beyond the extent which it had when the dower was assigned. *Carr v. Carr*, 4 Dev. and Bat., 179.

10. The action on the case, in the nature of waste, allowed by the act, Rev. Stat., ch. 119, sec. 4, to one tenant in common against his co-tenant, is confined to cases where there is a permanent injury done to the property held in common. Hence, where A and B were tenants in common of a fishery, to which, as a part thereof, was attached a small strip of land on the river bank, in which was a deposit of marl, valuable only to be used on land under cultivation; and B dug out the marl and carried it away against the remonstrance of A, though not injuring the fishery thereby, it was held that A could not, for this, maintain case in the nature of waste against B. *Smith v. Sharpe*, Busb., 91.

11. The husband of a tenant in dower is not liable for mere permissive waste, after the death of his wife and the surrender of possession. But he is liable to an action on the case in the nature of waste, after the death of his wife, for voluntary waste in removing a house, even though he may have built the house himself. *Dozier v. Gregory*, 1 Jones, 100.

12. The purchase of a particular estate in land by the reversioner does not prevent him from maintaining an action on the case in the nature of waste, for waste committed by the particular tenant before the purchase. *Dupree v. Dupree*, 4 Jones, 387.

13. Such a purchase is no evidence, tending to show that a claim for damages for antecedent waste committed by the particular tenant had been settled thereby. *Ibid.*

14. An action of waste, wherein the title of the plaintiff to the place wasted is set forth as being a *devise of a remainder in fee*, cannot be sustained upon proof that he was entitled to a *reversion in fee by descent*. *Sutherland v. Jones*, 6 Jones, 321.

15. Where one of two tenants in common of land, being in sole possession, proceeded to clear all the arable land, and by a succession of crops wore it out, and left no timber to repair fences, it was held that these injuries were not such as the law would remedy by an action on the case in the nature of waste, but the proper mode of redress was by action of account, or by

a bill in equity for an account. *Darden v. Cowper*, 7 Jones, 210.

16. Whether an action on the case in the nature of waste will lie for one tenant in common against another, even where the injuries amount to destruction, *quære*. *Ibid*.

See (Abatement by the death of parties, 6.)

WAY.

1. Ways are of two kinds, those which are established by public authority, and private ones which are by grant or prescription. A way, which has been used as such for forty years by a neighborhood, will not be established as a way, when the commencement of the usage is known. *Bordeaux v. Williamson*, 2 Hay., 301, (491.)

2. The use and enjoyment of a private way for more than twenty years will not alone give a title to the easement. Such use and enjoyment, to have that effect, must have been *adverse*, and *as of right*. *Smith v. Bennett*, 1 Jones, 372.

3. The user of a private way for twenty years or more, not adversely, nor under a claim of right, is no sufficient ground for the jury to presume a grant of the easement. *Ray v. Lipscomb*, 3 Jones, 185.

See (Evidence—Presumptions, 33–35–36–39.) (Wrecks, 3.)

WHARFAGE.

1. A wharfinger has a double remedy for his wharfage, a lien on the article and a *personal lien* or claim on the owner. If the owner of the article sell it, and give notice to the wharfinger of such sale and tender the wharfage then due, he will be discharged from liability for future wharfage. Such notice may be given either verbally or by a delivery order. *Wooster v. Blossom*, 5 Jones, 244.

WIDOW.

- I. Of her dower.
- II. Proceedings to obtain dower.

- III. Her interest in the personal estate of her husband.
- IV. Dissent from her husband's will.

I. OF HER DOWER.

1. Since the act of 1784 (Rev. Code, ch. 118, sec. 1,) a widow is entitled to dower only of the lands of which her husband died seized or possessed. *Winstead v. Winstead*, 1 Hay., 243, (280.)

2. If the husband's land be levied on in his life time and sold after his death, his widow shall not have dower therein. *Ibid.* (This point was affirmed in *Hodges v. McCabe*, 3 Hawks, 78, but overruled by *Frost v. Etheridge*, 1 Dev., 30.)

3. To a petition for dower, the defendant is not obliged to answer on oath, but may plead his defence. *Whitehead v. Clinch* 2 Hay., 3, (146.)

4. A widow cannot enter upon and occupy what part of her husband's land she pleases, without an assignment of dower. *Williamson v. Cox*, 2 Hay., 4, (147.)

5. If a jury in laying off dower give the widow too much, the heirs may show this to the court by affidavit, and the court, upon a rule made for that purpose, will enquire into and set aside the verdict if justice require it. If too little be allotted, the widow may show it by affidavit, and the same course will be pursued; each party being at liberty to file counter affidavits. *Eagles v. Eagles*, 2 Hay., 181, (378.)

6. The rents which accrue before the assignment of dower belong to the heir, but he is answerable over to the widow for them as damages for not assigning her dower. The remedy for the widow to recover these damages is by petition for a writ of dower, and praying therein to have the damages assessed; upon which the court will order an issue to be made up, and submitted to a jury between her and the heir. She cannot maintain an action on the case, against the heir or any other person, for the rents received before the assignment of dower. *Sutton v. Burrows*, 2 Murph., 79.

7. A deed executed by a husband before marriage, conveying all the lands which he then had, or should thereafter acquire, will not pass lands afterwards acquired, and his widow will be entitled to dower in them. *Arrington v. Arrington*, 2 Car. L. R., 253, (232.)

8. Where a levy was made on lands in the life time of the husband, upon which a sale was made after his death, it was held that his widow was not entitled to dower, because the sale rela-

ted back to the levy or *teste* of the execution. *Hodges v. McCabe*, 3 Hawks, 78. (Overruled. See *Frost v. Etheridge*, 1 Dev., 30.)

9. If a husband have, in his life time, conveyed his land to a trustee for the payment of his debts, his widow will not be entitled to dower, though he remained in possession until his death. *Taylor v. Parsley*, 3 Hawks, 125.

10. A widow is entitled to dower in lands, sold after the death of her husband under a *fi. fa.* tested and levied in his life time. *Frost v. Etheridge*, 1 Dev., 30.

11. A sale of land under execution defeats the estate of the defendant, and bars the dower of his widow, where the levy and sale were in the life time of the husband, though the deed be not executed to the purchaser, until after the assignment of dower. *Davidson v. Frew*, 3 Dev., 3.

12. The claim which a widow has for dower, in the lands of which her husband died seized, is not, before assignment, "a right or title" to the land, within the meaning of the act of 1715, and is not, therefore, barred by the limitations of that act. *Spencer v. Weston*, 1 Dev. and Bat., 213. (See Rev. Code, ch. 65, sec. 1.)

13. Damages for the detention of dower cannot be claimed for a period anterior to a demand for its assignment. *Ibid.*

24. A conveyance of lands made by a man in contemplation of marriage, with a view of defeating his intended wife of her dower in these lands, is void, as against the widow, by the act of 1784. *Littleton v. Littleton*, 1 Dev. and Bat., 327. (See Rev. Code, ch. 118, sec. 1.)

15. There must be an actual intent to defraud the wife of her dower, to avoid a conveyance under the act of 1784; and any conveyance in which the husband reserves to himself the property during his life, is necessarily but colorable, and, therefore, void as to the widow. *Ibid.*

16. So, in any other case, in which the apparent immediate disposition is not *bona fide*, is not intended to interfere with the present enjoyment of the husband, but only to hinder that of the widow. *Ibid.*

17. A deed in trust executed by a husband, but not proved and registered until after his death, operates, nevertheless, by relation to the time of its execution to defeat the widow's claim of dower; for the act of 1829, which prescribes that deeds in trust shall not operate against creditors and purchasers but from their registration, does not apply to the widow's claim of dower, she being, with respect to such claim, neither a creditor nor purchaser. *Norwood v. Morrow*, 4 Dev. and Bat., 442. (See Rev. Code, ch. 37, sec. 22.)

18. For feudal reasons, a widow holds her dower of the heir, or of the person in whom is the reversion of the land assigned for dower. But in point of title her estate is considered as de-

rived from, and a continuation of, that of her husband; and although between the death of the husband and the assignment of dower, a seizen of the heir or of another person intervenes, yet, upon the assignment, she is in by relation from the death of her husband. *Ibid.*

19. A widow does not require the assistance of the heir, but brings her action against any person who has the freehold, whether that be the heir or any other. She may sue a disseizor, abator or intruder, and hence those persons, although holding the freehold by wrong, may assign her dower and thereby bind those who have the right. *Ibid.*

20. If a husband make a voidable alienation, and do not avoid it during his life, there can be no title of dower, because he had not the seizen at his death. But if the deed be void, the seizen remained in the husband, and the right of dower attached thereto. *Ibid.*

21. A deed for land, executed by a husband in trust to secure a usurious debt, is void as against his widow's claim to dower, and she is not bound to await the action of the heirs to regain the possession from one holding adversely under the deed. *Ibid.* (A *bona fide* purchaser without notice, under such a deed, would no doubt now be protected against a widow's claim of dower. See Rev. Code, ch. 50, sec. 5.)

22. A deed, executed by a husband, but not registered until after his death, operates by way of relation from the line of its execution to bar the wife's claim of dower. *Ibid.*

23. The dower allotted to a widow under the act of assembly must be one third in *value*, not one third in *quantity*. *McDaniel v. McDaniel*, 3 Ired., 61.

24. When the conveyance of a husband to his heirs is to operate only after his death, and in the mean time he is to have the enjoyment of the land, the conveyance must be deemed colorable and void as to his widow; and this presumption can only be repelled by his having made an effectual provision for her. *McGee v. McGee*, 4 Ired., 105.

25. Where the husband, in executing a conveyance to his heirs, declares the object to be to defeat his wife of dower, it is a case of actual fraud. *Ibid.*

26. Where a deed is made by a husband to his heirs to defeat his widow of dower, the circumstance of his afterwards attempting to make a will in her favor for a part of his lands is not admissible on the question of fraud between the widow and the heirs, because, being incomplete, it was only the subsequent declaration of one who had committed a fraud, of his not intending to do so. *Ibid.*

27. Though it is otherwise in England, yet, by our statute, any testamentary provision for a wife, in either real or personal property, excludes her from any other share of her husband's

estate of either kind, unless she dissent from his will in the manner and within the period pointed out by the statute, and thereby elect to take according to her legal rights independent of the will. *Brown v. Brown*, 5 Ired., 136.

28. The act of 1835, ch. 10, refers only to the case of personal estate, giving the widow the same share of a residue of personal estate, as if the husband had died intestate; but has no provision as to real estate. *Ibid.* (See Rev. Code, ch. 118, sec. 13.)

29. Where lands were devised to a husband, for his use, that is, "the lands to be used by him, and the profits thereof to be to him, but the lands to be by him divided and distributed among his children as he may think proper;" *it was held* that the husband took but an estate for life in the lands, with the power of dividing it, either in his life time or at his death, among his children, and, that until such appointment, the remainder in fee either vested in the children, or descended to the heirs of the testator, so that the widow of the devisee had no right to dower in the lands. *Alexander v. Cunningham*, 5 Ired., 430.

30. Where it appeared that the deed, under which a widow's husband claimed, had been delivered to him, but had not been registered at the time of his death, and could not since be found, *it was held* that he did not die seized, and his widow had no right to recover dower, at least in a court of law. *Thomas v. Thomas*, 10 Ired., 123.

31. Under the act, Rev. Stat., ch. 121, sec. 11, barring the claim of an adulteress for dower, "if she willingly leave her husband and go away and continue with her adulterer," although the wife doth not continually remain in adultery with the adulterer, yet if she be with him and commit adultery, it is a "continuing" within the act; and if she once remain with the adulterer in adultery, and he afterwards keep her against her will, or if the adulterer turn her away, she shall still be said "to continue" with the adulterer within the act. *Walters v. Jordan*, 13 Ired., 361. (See Rev. Code, ch. 118, sec. 11.)

32. There may not be any adultery before the wife leaves her husband, nor an elopement with the man with whom she afterwards committed adultery, but she is barred by adultery with any person, supervenient upon her willingly leaving her husband. But in order to support, under the act, a bar to the claim of dower, it must appear that the wife *willingly* left her husband; and if driven away by him or by his compulsion, she does not forfeit her dower. *Ibid.*

33. It is immaterial whether the adultery was committed before or after the separation. *Ibid.*

34. A widow, who dissents from her husband's will, takes dower as in case of his intestacy, and is therefore entitled to have the dwelling house, improvements, &c., allotted to her in the assignment. And in such case, as in case of intestacy, the

jury have a right to assign dower altogether in one tract of land. *Jones v. Jones*, Busb., 177.

35. The jury, in assigning dower, have no right to give the widow the privilege of cutting firewood and feeding stock upon land not set off for dower. *Ibid.*

36. A widow is entitled to dower in the equitable interest which her husband had in land covenanted to be conveyed to him. *Thompson v. Thompson*, 1 Jones, 430. (See Rev. Code, ch. 118, sec. 6.)

37. Where a widow being a minor, and having no guardian, dissented *in person* and in open court from her husband's will, and then on her petition dower was assigned to her by an order of the proper court; *it was held* that, though her dissent was made erroneously, yet as dower had been assigned by a court of competent jurisdiction, her right to it could not be impeached in an action of ejectment brought by her for its recovery. *Cheshire v. McCoy*, 7 Jones, 376.

38. Whether, where a widow entered into a certain tract of land and occupied it for more than twenty years, claiming it as her dower in her deceased husband's estate, the law will not presume an assignment by the heirs, *quære*. *McMillan v. Turner*, 7 Jones, 435.

39. A widow who has qualified as executor to her husband's will, cannot afterwards dissent from it, so as to entitle her to claim dower. *Mendenhall v. Mendenhall*, 8 Jones, 287.

See (Estoppel—By matter other than record or deed, 19.)

II. PROCEEDINGS TO OBTAIN DOWER.

1. The act of 1784 has not indicated the remedy for an illegal or excessive allotment of dower; but the usages of our courts have defined it, to wit: that when the report of the jury is returned, exceptions may be thereunto taken by any one aggrieved, and the court will set aside the allotment, and order a new allotment, if sufficient cause be shown. And if a judgment be pronounced overruling such exceptions, the party may appeal, which will not disturb the judgment that the widow recover her dower, nor vacate any thing that has been done in execution of that judgment, but will only carry up the proceeding instituted to set aside the inquisition of the jury. *Stiner v. Cawthorn*, 4 Dev. and Bat., 501. (See Rev. Code, ch. 118, sec. 2.)

2. In a proceeding by petition under the act of 1784, for dower, the suit for dower is at an end by the judgment of the court awarding dower. This is the only judgment to be rendered in the suit, and any proceeding to set aside the inquisition taken under our act, like the *sci. fa.*, or writ of error, or writ of admeasurement, or bill in equity used in England to set aside the

sheriff's assignment of dower, is in the nature of a new suit. *Ibid.*

3. Under the act of 1784 the jury cannot assign to the widow the whole of her husband's real estate, upon the ground that the whole of it is necessary for her decent subsistence. The act gives her one-third of the real estate of which her husband died seized, in which is to be comprehended the mansion house and offices; or if the whole mansion house and offices cannot be so taken in without injustice to the children, then such part or portion thereof as may be sufficient to afford her a decent subsistence. But the mansion house, or a part of the mansion house, is not to be allotted in addition to her third, but in part of her third; and if the whole be allotted to her by the jury, when her husband had no other real estate, the report will be set aside. *Ibid.*

4. In a petition for dower, it is sufficient for the widow to state that her husband died seized of the land. It is not necessary to state that the heirs entered as heirs, or to set forth deeds executed by her husband to the heirs in his lifetime and allege that they were fraudulent as to her. For, upon the trial of the issue, if made by the answers and replications, whether he died seized or not, the question of fraud will arise. *McGee v. McGee*, 4 Ired., 105.

5. Where, on a petition for dower in the county or superior court, the jury have made a report, and that report is confirmed, the heirs cannot, at a subsequent term, file a petition to set aside this allotment of dower. If there be errors in the allotment, the redress, if any, is not by petition. *Bowers v. Bowers* 8 Ired., 247.

III. HER INTEREST IN THE PERSONAL ESTATE OF HER HUSBAND.

1. Where a widow dissents from her husband's will, she is not entitled to a year's provisions under the act of 1796. *Collins v. Collins*, 2 Car. L. R. 417, (301.) (She is entitled in such case now. See Rev. Code, ch. 118, sec. 23.)

2. When a husband dies intestate, his widow must, under the act of 1796, file her petition for a year's support, at the term of the county court, when letters of administration upon his estate are taken out. *Gillespie v. Hyman*, 4 Dev., 119. (The petition may be filed at or before the term when administration is granted. See Rev. Code, ch. 118, sec. 19.)

3. A release does not operate upon a mere possibility; therefore, an antenuptial agreement, whereby the wife released all her claim, as widow, to the estate of her intended husband, is not at law a bar to her petition for a year's support. *Murphey v. Avery*, 1 Dev. and Bat., 25.

4. A widow of a testator, to entitle herself to a year's provisions under the act of 1827, must enter her dissent to the

will and file her petition at the term of the county court when it is proved; and, if the allowance be made at a subsequent term, it will, on motion, be set aside. *Pettijohn v. Beasley*, 1 Dev. and Bat., 254. (A widow may now file her petition within six months after the probate of the will from which she dissents. See Rev. Code, ch. 118, sec. 23.)

5. A gold watch worth one hundred dollars, the gift of a husband to his wife, cannot in this state be considered as among the *paraphernalia* of the wife, when the husband, at the time of the gift, was a man of limited means, and afterwards died insolvent. *Vass v. Southall*, 4 Ired., 301.

6. What shall be considered as *paraphernalia* of the wife is a question for the court; but *quære*, whether a court of law can take notice of it at all. *Ibid.*

7. Where a widow files a petition for a year's provision, under the statute, and dies before any allotment is made, neither her administrator, nor her children, have any right to it. The right is only given to the widow and expires by her death before a final decree for the allotment. *Cox v. Brown*, 5 Ired., 134. (See Rev. Code, ch. 118, secs. 18 and 19.)

8. The administrator of a widow has no right to claim the year's provision, to which she would have been entitled out of her husband's estate under the act, if she had lived until the allotment had been made. Before such allotment she has no interest transmissible to her administrator; nor, after the death of the widow before such allotment, can her children claim any provision under the act. *Kimball v. Deming*, 5 Ired., 418.

9. A widow is not entitled to use money belonging to her intestate husband, but must account for it to his administrator. *Griffin v. Simpson*, 11 Ired., 126.

10. A widow is not barred of her right to her year's provision under our act, Rev. Stat., ch. 121, sec. 18, by her adultery, &c., as she is of her dower by the 11th section of the same chapter. *Walters v. Jordan*, 12 Ired., 170. (See Rev. Code, ch. 118 secs. 11, and 18.)

11. Where the widow dissents from her husband's will, advancements by the testator to a child must be brought into *hotchpot*, in the ascertainment of her share of the personalty. *Credle v. Credle*, Busb., 225.

See (Distribution, 3-4-9.)

IV. DISSSENT FROM HER HUSBAND'S WILL.

1. A widow cannot dissent from her husband's will by attorney. She must do so personally in open court. *Hinton v. Hinton*, 6 Ired., 274. (She may now enter her dissent by attorney. See Rev. Code, ch. 118, sec. 1.)

2. Where a testator dies, having made no provision by his

will for his wife, and that wife is a lunatic under the care of a committee, she cannot claim by petition any portion of the testator's estate, because she is incapable, from want of reason, of dissenting herself, and her committee has no authority by law to enter a dissent in her behalf. *Lewis v. Lewis*, 7 Ired., 72. (She may now enter her dissent by a guardian. See Rev. Code, ch. 118, sec. 1.)

WILLS.

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| <p>I. Who may make a will.</p> <p>II. What shall be deemed a will.</p> <p>III. Publication and re-publication of wills</p> <p>IV. Attested wills.</p> | <p>V. Holograph wills.</p> <p>VI. Nuncupative wills.</p> <p>VII. Revocation of wills.</p> <p>VIII. The probate and reprobate of wills.</p> |
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I. WHO MAY MAKE A WILL.

1. An infant under the age of twenty-one years cannot dispose of his personal property by will. *Williams v. Baker*, 2 Car. L. R., 599, (401.) (By act of 1811, an infant of eighteen years might make a will of personalty, but now he cannot until he arrives at twenty-one. See Rev. Code, ch. 119, sec. 2.)

2. A married woman, under a power in a settlement, may make a will of real estate, which will be supported in equity as an appointment, but which cannot be propounded for probate as a will in a court of law. *Harvey v. Smith*, 1 Dev. and Bat., 186.

3. If a testator have mind enough to know what he is doing and to whom he is giving his property, he has capacity sufficient to enable him to make a will. *Horne v. Horne*, 9 Ired., 99.

4. An infant under the age of twenty-one, and above that of eighteen, has power, by a will duly executed, to dispose of his personal estate, notwithstanding the acts of 1840, ch. 62, and 1846, ch. 54. *Williams v. Williams*, Busb., 271. (An infant under twenty-one years of age cannot now make a will to dispose of either real or personal property. See Rev. Code, ch. 119, sec. 2.)

II. WHAT SHALL BE DEEMED A WILL.

1. Though a paper writing be called a deed in the body of it, and the party had been advised to make a deed, yet if the structure and operation of the writing show it to be testamentary, made with a view to the disposition of a man's estate after his

death, it shall enure as a will. *Henry v. Ballard*, 2 Car. L. R. 595, (397.)

2. Where one gave directions for drafting a will both of real and personal estate, and, upon receiving the draft, was informed that in its present shape it was good only as to personalty, and did no act declaring it to be his will, but merely kept it with his valuable papers, it was held not to be a valid will of personalty. *Fort v. Fort*, 3 Dev., 19.

There is a presumption arising from the face of every imperfect testamentary paper, that it was not intended to operate in its then unfinished state; but this is a presumption of fact, and liable to be rebutted by other testimony. *Jones v. Kea*, 4 Dev., 301.

4. A clause of attestation annexed to a paper, which is *not attested*, is not conclusive evidence of the abandonment by the testator of his intention that it should operate as his will. *Ibid.*

5. Whether it was the testator's intention that a paper, purporting to dispose of both real and personal estates, should operate as a disposition of one, unless it can take effect as to both, is a question of fact for the consideration of the jury. *Ibid.* (A paper must now operate as a will of both real and personal estate, or it cannot operate as to either; see Rev. Code, ch. 119.)

6. A paper writing executed by two persons, making, after the death of both, a joint disposition of all their property, cannot be admitted to probate as a conjoint or mutual will. And such a paper writing cannot be proved as the separate will of either of the supposed testators, because it purports to be a *joint* and not a *separate* will, and because it implies from its structure an agreement between them, which is inconsistent with its revocability, and therefor prevents its operation as a will. *Clayton v. Liverman*, 2 Dev. and Bat., 558.

7. A devise of lands in this state, since the 1st day of January, 1838, is good under the 1st section of the 122nd chapter of the Revised Statutes, notwithstanding the repeal of all the British Statutes by the 2nd section of the 1st chapter of the said Revised Statutes. *Overton v. Overton*, 4 Dev. and Bat., 197. (See Rev. Code, ch. 119, sec. 1.)

8. By the ecclesiastical law of England, and under our law before the act of 1840, a paper writing purporting to be the last will of a decedent, which it was proved he declared to contain his wishes as to the disposition of his property, but which he was prevented from either signing, publishing or having attested by the sudden visitation of God, was a good will as to personalty. *Gaskins v. Gaskins*, 3 Ired., 158.

9. And though some short time may have elapsed between the period when it was in his power to have executed formally such paper writing, and that, when he was incapacitated by the visitation of Providence, yet if such delay proceeded merely from

convenience, and not from any hesitancy as to the dispositions he wished to make, or any desire to make changes therein, the paper writing is a good will of personalty. *Ibid.* (Wills of realty and personalty are now to be executed alike. See Rev. Code, ch. 119, sec. 1.)

10. The act of 1840, ch. 62, which enacted "that no will in writing made after the 4th day of July, 1841, whereby personal property is bequeathed, shall be sufficient to convey or give the same, unless such will be executed with the same formalities as are required in the execution of wills of real estate," &c., did not apply to wills of personalty signed and published before the 4th of July, 1841, though the testator may not have died until after that period. *Salter v. Bryan*, 4 Ired., 494.

11. If a testator in his will refer expressly to another paper, and the will is duly executed and attested, that paper, whether attested or not, makes a part of the will; but the instrument referred to must be so described, as to manifest distinctly what the paper is that is meant to be incorporated; and the reference must be to a paper already written, and not to one to be written subsequently to the date of the will. *Chambers v. McDaniel*, 6 Ired., 226.

See (Evidence—Parol evidence, when admissible, 33.)

III. PUBLICATION AND REPUBLICATION OF WILLS.

1. Any circumstance plainly indicative of the testator's satisfaction with the script as his will, at a particular time, may be taken to be a republication at that time; and particularly is a codicil so considered. *Hatch v. Hatch*, 2 Hay., 32, (191.)

2. The publication of a holograph will, shall be referred to the date of the will, not to the time of its being found among the valuable papers of the deceased, or of its being lodged in the hands of a person for safe keeping. *Jiggitts v. Maney*, 1 Murph., 258.

3. A testator made a holograph will in 1833, and placed it among his valuable papers; and afterwards, in 1847, being about to leave the country, he deposited the same will, together with other papers, with a friend, for safe keeping; and it was held that this did not of itself amount to a republication of the will, and that therefore, land acquired by the testator after 1833, did not pass by it. *Battle v. Speight*, 9 Ired., 288.

4. Whether the republication of a will can be proved by parol evidence of the declarations of the testator, merely, is a matter of great doubt. And, at all events, the evidence should show a clear determination on the part of the testator to republish. *Battle v. Speight*, 10 Ired., 459.

5. The act of 1844, ch. 83, making devises to operate on such real estate as the testator may have at the time of his death,

was altogether prospective, and did not extend to wills made and published before the time when the act went into operation, though the testator did not die until afterwards, unless there had been a republication of the will after the act went into operation. *Williams v. Davis*, 12 Ired., 21. (See Rev. Code, ch. 119, sec. 6.)

6. There cannot be republication, by oral declarations merely, of what purports to be an attested will; and it is doubtful whether there can be such a republication of a holograph will. As a paper purporting to be an attested will, there cannot be a republication, unless by a re-execution of the same instrument, or by the execution of a codicil with the ceremonies required by the statute. *Love v. Johnson*, 12 Ired., 355.

7. After a script had been formally executed as a will, one of the subscribing witnesses, upon his own suggestion but with the consent of the deceased, took it for the purpose of submitting it to the examination of counsel, but did not return it, nor have any discourse with the testator about it afterwards; and *it was held* that the act of publication was complete to make it the will of the testator. *In re Zollicoffer's will*, 5 Jones, 309.

8. A holograph will revoked by the marriage of the testator under the act, Rev. Code, ch. 119, sec. 23, can only be revived and published by a written instrument setting forth his intention and duly attested by two witnesses, or by a writing in the testator's own handwriting, and found among his valuable papers, or handed to one for safe keeping. *Sawyer v. Sawyer*, 7 Jones, 134.

IV. ATTESTED WILLS.

1. On the trial of an issue of *devisavit vel non*, a witness who was disinterested at the time of the attestation, but has become interested since, need not be offered. *Hampton v. Garland*, 2 Hay., 147, (320.)

2. The signing of a will may be proved by proof that the testator acknowledged it, though the signature was not before him, and though the paper lay at a distance on the table. The attestation of the witnesses may be at different times, so it be in the presence of the testator. *Eelbeck v. Granberry*, 2 Hay., 232, (411.)

3. There ought to be an attestation by two witnesses of every part of a will of lands, and therefore a will, which was attested by one witness, and afterwards the date was inserted, and then the other witness subscribed, is not good to pass lands. *Rhea v. Norman*, 2 Hay., 342, (523.) (Overruled by *Bateman v. Mariner*, 1 Murph., 176.)

4. A witness, to whom the testator has by will given "permission to live six months in his house if she chooses," is a com-

petent witness to prove the will as to real estate. *Winant v. Winant*, 1 Murph., 148.

5. If a testator sign his will, and it be attested in his presence by one witness, and he then insert the date, and the words "my dearly beloved," and have it attested in his presence by another witness, and afterwards acknowledge the execution in the presence of both witnesses, it will be a valid execution of the paper as a will of both real and personal estate. *Bateman v. Mariner*, 1 Murph., 176.

6. Where it appeared from the certificate of the probate of a will made in Tennessee, that but one witness swore that he subscribed the will as a witness in the presence of the testator, and the other witness to the will did not appear to have been sworn at all, *it was held* that the will should not be read as evidence of a devise of lands lying in this state. *Blount v. Patton*, 2 Hawks, 237.

7. A title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated. Hence, two witnesses are required to an *attested* will of lands situate in this State, whether the will be made within or without the State. *Ibid.* (See Rev. Code, ch. 119, sec. 1.)

8. Where one of the executors, to whom lands are devised to be sold, and for the selling of which commissions were given to the executors, was one of the only two subscribing witnesses of the will, *it was held* that the witness was interested at the time of attestation, and the will was therefore not well executed; and that a release made by this executor of all his interest to his co-executors did not avail to make it good. *Allison v. Allison*, 4 Hawks, 141. (An executor is now a competent attesting witness to a will. See Rev. Code, ch. 119, sec. 9.)

9. The wife of the sole executor of a will, her husband having renounced, is competent as one of the subscribing witnesses to prove its execution as a will of lands. *Daniel v. Proctor*, 1 Dev., 428.

10. A subscribing witness to a will of lands, who was, at the time of his attestation, a presumptive heir of the deviser, is not interested in the devise, within the meaning of the act of 1784. *Old v. Old*, 4 Dev., 500. (See Rev. Code, ch. 119, sec. 1.)

11. An attesting witness to a will, who has become interested since his attestation, need not be produced by the person propounding it, but the will may be established by proof of his handwriting. *Ibid.*

12. A subscribing witness to a will of real estate, who is named executor therein, may, nevertheless, be called to support it. *Overton v. Overton*, 4 Dev. and Bat., 197. (A person named executor in a will of either personalty or realty may now be examined, either for or against the will. See Rev. Code, ch. 119, sec. 9.)

13. Where it was proved by one of the only two subscribing witnesses to a will, offered as a will of real estate, that he was

requested by the testator to prepare his will according to his instructions, and he did so, and signed his name as a witness before the testator signed, but not in his presence, and then read the will to the testator, and told him he had signed as a witness, and the testator approved and executed it, and the other witness then signed in presence of the testator, *it was held* that this was not a valid execution of a will to pass real estate, the statute requiring *both* the witnesses to sign in the presence of the testator. *Ragland v. Hemmington*, 1 Ired., 561.

14. A devise of a power to an executor to sell land, or a devise of the land to him in trust to sell, does not give him such an interest in the land as disqualifies him from being a subscribing witness to the will. *Tucker v. Tucker*, 5 Ired., 161.

15. The act of 1840, ch. 62, requiring wills of personalty to be executed with the same formalities as wills of realty, is to be construed to mean that they shall be attested by two subscribing witnesses, no one of whom at the time of attestation is interested in the bequest of personal estate. It does not confine the interest of the witnesses to the devise of lands, as in the case of wills devising lands. Therefore, where the will disposes of both real and personal estate, it may be good, so far as the attestation of the witnesses is concerned, as to one species of property, and not as to the other. *Ibid.*

16. One who is named executor in a will is so far interested, by reasons of the commissions to which he is entitled, as to render him an incompetent attesting witness, as regards the disposition of personal property. Therefore, where a will was made devising real, and bequeathing personal estate, and it was attested by two witnesses, one of whom was named executor; *it was held* that it was a good will as to the lands, but not good as to the personalty. *Ibid.* (A person named executor is now a good attesting witness to a will of either kind of property; see Rev. Code, ch. 119, sec. 9.)

17. A person named as executor is not competent as an attesting witness to a will of personalty; nor will his subsequent renunciation and release make him so. He must be disinterested at the time of the attestation. *Morton v. Ingram*, 11 Ired., 368. (But see Rev. Code, ch. 119, sec. 9.)

18. It is sufficient that a subscribing witness to a will makes his mark. *Pridgen v. Pridgen*, 13 Ired., 259.

19. Upon the trial of an issue of *devisavit vel non*, an attesting witness is competent to prove the propounded paper as a will of real estate, although he is named executor, and has not renounced. *Kirby v. Kirby*, Busb., 454. (An executor is now competent to be an attesting witness to any will. See Rev. Code, ch. 119, sec. 9.)

20. Where one of the witnesses to a script subscribed the same before the alleged testator signed it and not in his pre-

sence, and it was afterwards signed by the alleged testator and acknowledged as his will in the presence of the person who first subscribed, and also of another witness who subscribed it in the presence of the testator, and the first witness did not subscribe it again because both he and the alleged testator thought it was unnecessary; *it was held* that the script was not properly attested by two witnesses, according to the requirements of the act of assembly. *In re Cox's Will*, 1 Jones, 321. (See Rev. Code, ch. 119, sec. 1.)

21. The wife of one named as executor in a will is not competent as a subscribing witness to prove the same, although her husband has entered a renunciation of the office of executor in open court, and made a release of his interest under the will. *Huie v. McConnell*, 2 Jones, 455. (The wife in such a case would now be competent. See Rev. Code, ch. 119, secs. 9 and 10.)

22. The witnesses to an alleged will cannot be said to have subscribed it in the presence of the supposed testator, when he was lying in a bed very sick, and from which he could not see the witnesses subscribe the paper, without raising himself or being raised up on his elbow, and, especially, when that could not be done without endangering his life. *Jones v. Tuck*, 3 Jones, 202.

23. An executor before the enactment of the Revised Code could not be a subscribing witness to a will, so as to support it, even though he might renounce and release his interest, and he is still incompetent as to any will made and published before the first of January, 1856, when the Revised Code went into operation. *Gunter v. Gunter*, 3 Jones, 441.

24. Where a script was attested by three witnesses, one of whom was incompetent on account of a pecuniary legacy, and afterwards a legacy was transferred from one legatee to another, by erasing the bequest in one part of the script and interlining it in another, as to which alteration one of the competent witnesses to the first execution and the one taking the legacy again attested the script, the alteration in no wise affecting his legacy, *it was held* that the script in its altered condition was duly attested. *Malloy v. McNair*, 4 Jones, 297.

25. Where two persons subscribed a will as witnesses in the presence of the testator, after he had signed it, and then the name of one of the witnesses was inserted as executor, whereupon a third person was procured, who on the acknowledgment of the will by the testator subscribed it as a witness, *it was held* that this did not impair the validity of the paper as a will, particularly as the interlineation of the name of the executor did not in any degree affect the dispositions of the will. *Grigg v. Williams*, 6 Jones, 518.

26. Where the script was attested by witnesses in the same room with the decedent, about eight feet to one side of him, but

in a position to be seen by him in the act of attestation if he should turn his head half round, and he was able so to turn his head without pain or inconvenience, *it was held* that the witnesses had subscribed in the presence of the testator. *Cornelius v. Cornelius*, 7 Jones, 593.

See (Wills—Of the probate and reprobate of wills, 8-11-39-40-69-70-71-73-78-89.)

V. HOLOGRAPH WILLS.

1. Where a will is found in the drawer of a bureau, commonly kept locked, in which the testator's wife was in the habit of keeping her money, jewels, &c., and which the testator pointed out as the place for depositing his will, it is found among his valuable papers, within the meaning of the act. *Harrison v. Burgess*, 1 Hawks, 384. (See Rev. Code, ch. 119, sec. 1.)

2. The signature of a subscribing witness is no part of a will, and if there be but one to a will of lands, it may be proved to be all in the testator's handwriting, and to have been found among his valuable papers and effects. *Ibid.*

3. The wife of the testator may be the person, to whose keeping his will, all in his own handwriting, is entrusted under the act. *Ibid.*

4. The probate of a holograph will is good, if the place of its deposit be proved by one witness only. *Galloway v. Yates*, 1 Dev., 296.

5. Upon an issue of *devisavit vel non*, as to an unattested paper propounded as a will of real estate, there must be affirmative and direct proof as to the fact that it was deposited with some one as a will, or was found after the party's death among his valuable effects. Hence, the circumstances that the party, who had been a resident of Wilmington, died abroad; that the paper writing was produced by his partner and confidential friend, also a resident of Wilmington and since dead; that the paper was sealed up and on the envelope was endorsed in the handwriting of the deceased, "copy Joseph Dean's will, June 17th, 1802, to be opened after his death by" (naming several persons;) constitute no evidence of the fact so required to be established. *St. John's Lodge v. Callender*, 4 Ired., 335.

6. The declarations of the person who produced the will, and who is since dead, as to the deposit being made with him, are not competent as evidence. Nor is the possession of the land, purporting to be devised, by the alleged devisee for thirty-six years, evidence in a court of probate of the *factum* of the will. *Ibid.*

7. Where a will is offered for probate upon the ground that it was found among the valuable papers of the deceased, being all in his handwriting, it is proper in the judge to leave it to the jury to

determine, whether, from all the circumstances, they believe the paper writing was deposited by the deceased among his valuable papers, with the intention that it should be his will. *Simms v. Simms*, 5 Ired., 684.

8. In order to entitle a holograph will to probate, the handwriting of the deceased should be so generally known, as to preclude the attempt to establish a fabricated will. That it is "generally known" may be inferred from its being testified to by a large number of witnesses. *Outlaw v. Hurdle*, 1 Jones, 150.

9. It is no objection to the probate of a script as a holograph will, that it has one subscribing witness, and was intended by the decedent to be proved by subscribing witnesses. *Brown v. Beaver*, 3 Jones, 516.

10. Where a decedent had in a bureau two drawers, in one of which he kept his notes, deeds and other papers of value carefully arranged, together with his money and other valuable effects, and in the other he had some papers of little or no value, carelessly deposited, with some effects of very small value, *it was held* that a holograph script found in the latter drawer could not be proved as a will under the Rev. Stat., ch. 122, sec. 1; for that the articles found with the script could, in no just sense, be called "*the valuable papers or effects of the deceased*." *Little v. Lockman*, 4 Jones, 494. (The Rev. Code, ch. 119, sec. 1, has valuable papers *and* effects instead valuable papers *or* effects.)

11. A holograph will found among the valuable papers of the decedent, bearing a particular date, is presumed to have been put there by him; and that it was so deposited at the time of its date. *Sawyer v. Sawyer*, 7 Jones, 134.

12. A script to be good as a holograph will must be found among the valuable papers and effects at the time of, or after, his death, and it will not be sufficient that they were seen there eight months before that time. *Adams v. Clark*, 8 Jones, 56.

See (Wills—Of the probate and reprobate of wills, 49-79-80.)

VI. NUNCUPATIVE WILLS.

1. The persons, who are introduced to establish a nuncupative will, must have been specially called on by a testator to bear witness to what he was saying. If the words uttered were drawn from the testator by the person interested to establish them as a will, they will not constitute a good nuncupative will. *Brown v. Brown*, 2 Murph., 350.

2. A "credible witness" to prove a nuncupative will, under the 15th section of the act of 1784, means one who is competent according to the rules of the common law; and if he be incompetent from interest, such incompetency may be removed by a release. *Matthews v. Marchant*, 3 Dev. and Bat., 40. (See Rev. Code, ch. 119, sec. 11.)

3. In the probate of a nuncupative will every requisition of the statute ought to be faithfully observed; and especially the probate will not be good if the next of kin be not cited. *Rankin v. Rankin*, 9 Ired., 156.

4. A nuncupative will of personalty of more than two hundred dollars in value, witnessed at one time by one witness, and the same declaration made at another time and witnessed by another witness, is not witnessed by two witnesses as required by the act, Rev. Code, ch. 119, sec. 11. *Wester v. Wester*, 5 Jones, 95.

5. Where a person in his last sickness desired the physician to write his will, and he declined to do it, but told him that A and B were in the piazza of the house, and that he might make his will by oral declarations in their presence, whereupon A and B were called into the sick man's room at his request, when addressing A by name he stated to him, in the presence of B and the physician, how he wished his property divided, and named A and another person as his executors, *it was held* that there was a sufficient *rogatio testium* to make a good nuncupative will. *Haden v. Bradshaw*, 1 Winst., 263.

VII. REVOCATION OF WILLS.

1. A will in writing may be revoked by parol, but the words of revocation must denote a present intention to revoke. Directing a will to be burned by the person who has it in possession and who refuses to do so, is not a revocation. *Giles v. Giles*, Conf. Rep., 174, (290.) (How written wills must now be revoked. See Rev. Code, ch. 119, sec. 22.)

2. A revocation of a will of real estate, carried completely into effect, cannot be revived by any subsequent declaration by parol. *Ibid.*

3. A will held not to be revoked by the birth of a child after it was made, though the testator declared that he wished to alter it to make a provision for such child. *McCay v. McCay*, 1 Murph., 447. (Such children are now provided for. See Rev. Code, ch. 119, secs. 29 and following.)

4. A paper writing, though informal to operate as a will of lands, may yet revoke a former will. But this paper must be made *animo revocandi*. Our acts are silent as to the manner of revoking wills of land, and a will of land can be revoked by either words or acts evincing an immediate purpose to revoke. *Clark v. Eborn*, 2 Murph., 234. S. C. 1 Car. L. R., 91. (See Rev. Code, ch. 119, sec. 22.)

5. Where a tract of land is devised, and the deviser contracts to sell, or, as it seems, even sells it, such contract or sale does not amount to a revocation in law so as to prevent the probate of the will. *McCraiy v. Clark*, N. C. Term, R., 278, (98.) S. C., 2 Murph., 317.

6. If a *feme sole* make a will, and then marry and survive her husband, her will is not revoked but is good. *Wood v. Bullock*, 3 Hawks, 298. (A will of either a man or woman is now revoked by marriage alone. See Rev. Code, ch. 119, sec. 23.)

7. A cancellation is *prima facie* a revocation, but if made with the intent of executing a new will, and that intent fails, the cancellation is conditional and shall have no effect. *Bethell v. Moore*, 2 Dev. and Bat., 311.

8. Cancellation of a will by drawing lines across it is an equivocal act, and whether it amounts to a revocation depends upon the intention with which it was done. This intent may be gathered from contemporaneous acts of the testator; and where he cancelled his signature, and afterwards signed the will anew, and, by a codicil attached, referred to it, sealed the whole together and deposited it among his valuable papers, the jury may infer that the cancellation was not intended as an absolute revocation, but made with a view to another will, which was afterwards abandoned. *Ibid.*

9. When a will is found among a deceased person's papers immediately after his death, in a mutilated condition, the presumption of law is that the act of mutilation was done by him in his life time, and for the purpose of revocation, and the same presumption arises, where the repository of the will was equally accessible to a stranger, and to the deceased in the life time of the latter. *Bennett v. Sherrod*, 3 Ired., 303.

10. But no such presumption arises, but rather the contrary is to be inferred, when the will is not found mutilated until two days after the death of the testator, when, in the meantime, it has been under the control or in the custody of one interested to defeat it, and one who refused, when it was first demanded, to produce it, and did not then allege that it was mutilated. *Ibid.*

11. Where a testator, being sick in bed, called for his will and directed his son to burn it, and instead of so doing he retained the will and burnt another paper for the purpose of deceiving his father, who was thus deceived into the belief that his will was burnt, *it was held* that this did not amount to a revocation, as the will was not actually burnt. *Hice v. Fincher*, 10 Ired., 139.

12. Where, by marriage articles, the power of appointing the estate by will was given to the wife, and no disposition of the same was made by the articles in default of such appointment, *it was held* that a will, made by her before the marriage, will be revoked thereby under the act of 1844, ch. 33, sec. 10. *Winslow v. Copeland*, Busb., 17. (See Rev. Code, ch. 119, sec. 23.)

13. A codicil imports not a revocation, but an addition to, or explanation or alteration of, a prior will in reference to some *particular*, and assumes that in all other particulars the will is to be in full force and effect. And the rule, *ut res magis valeat quam pereat*, comes in aid of the general presumption, that one

who makes a will, intends thereby to dispose of all his property. *Boyd v. Latham*, Busb., 365.

14. Revocation of a will is an act of the mind, demonstrated by some outward and visible sign. Therefore, where the maker of a will threw it upon the fire, with the purpose of destroying and revoking it, and it was burned through in three places, but the writing was not scorched, and was then rescued and preserved against the maker's will and without his knowledge, *it was held* that the will was revoked. *White v. Casten*, 1 Jones, 197.

15. If a testator duly execute and publish a will, and afterwards, supposing it to be lost, make and publish a second will, inconsistent with the first, and containing a clause of revocation, but upon finding the first says he prefers it, and thereupon destroys the second, it is not a revocation of the first will, and it may be admitted to probate as his last will. *Marsh v. Marsh*, 3 Jones, 77.

VIII. THE PROBATE AND REPROBATE OF WILLS.

1. Probate of wills must be had in the county court of the county where the deceased resided. In the case of such probate, the superior court has only appellate jurisdiction. *In re Gerard's will*, 2 Hay., 2, (144.) (See Rev. Code, ch. 119, sec. 15.)

2. Where an issue of *devisavit vel non* had been made up between some of the next kin and the executor, and the issue found against the will, a devisee who had not been a party was not permitted to come in afterwards and have the issue retried. Our courts of probate are courts of record, and what is done by them is conclusive; otherwise of the ecclesiastical courts in England. *Ward v. Vickers*, 2 Hay., 164, (351.) *Quære* by Haywood.

3. Where any influence has been used in causing the execution of a will, the jury must judge whether it was by fair and reasonable means, or by unfair and fraudulent ones, and decide accordingly. *Eelbeck v. Granberry*, 2 Hay., 232, (411.)

4. A will, which has been admitted to probate improperly in the county court, cannot be attacked on that ground incidentally; therefore, in an ejectment, a copy of a will may be read as evidence, though one of the witnesses who proved the will was a legatee. *Stanly v. Kean*, Tay., 93, (58,) S. C. 2 Hay., 75, (242.)

5. The probate of a will in common form may be set aside after the term expires at which the will was proved, and a second probate be ordered by the same court. The court will look to all the circumstances of the case to aid its discretion in ordering a second probate. *Dickenson v. Stewart*, 1 Murph., 99.

6. A petition to set aside the probate of a will must, when

filed, be accompanied by an affidavit. *Moss v. Vincent*, 2 Car. L. R. 414, (298,) S. P. *Jeffreys v. Alston*, *Ibid*, 634, (438.)

7. An application to set aside the probate of a will, on the ground of irregularity, must be made to the court where the will was finally tried, and not to the court where it was first offered for probate. *Harper v. Gray*, 2 Car. L. R. 613, (416,) S. P. *Hodges v. Jasper*, 1 Dev., 459.

8. Where a will of lands appears to have been attested by two witnesses and the certificate of probate states that it was proved by one, it will be intended *prima facie* that it was legally proved by him. *University v. Blount*, N. C. Term R., 13, (455.)

9. In a petition to have the probate of a will set aside and the reprobate in solemn form ordered, all the heirs and next of kin need not be made parties; it being sufficient for the petition by one of them to bring forward all the executors, devisees and legatees, claiming under the will, as defendants. *Odom v. Thompson*, 1 Hawks, 58.

10. If the allegations of a petition for reprobate be that the persons who are interested in contesting the first probate were at the time under disabilities, and that the pretended testator had not capacity to execute a will, and these allegations are not denied in the answer, a reprobate will be ordered. *Odom v. Thompson*, 2 Hawks, 24.

11. It is not necessary to the valid execution of the will of a blind or illiterate person, that it should be read over to him in the presence of the attesting witness. *Hemphill v. Hemphill*, 2 Dev., 291.

12. The fact that a will was not read over to the testator is evidence to be left to the jury of his incapacity, or of undue influence, or of fraud; but upon proof of the due execution of a will, the law presumes the testator to have been aware of its contents, and the *onus* of proving the contrary is thrown upon him who alleges it. *Ibid*.

13. Upon the probate of a will in the superior court, on an issue of *devisavit vel non*, the clerk of the superior court should return the will with a certificate of its probate to the county court, which should direct both the will and the record of the superior court to be recorded. And a copy of the will, and of this certificate under the seal of the county court, is a sufficient attestation of the probate. *McNiel v. McNiel*, 2 Dev., 393.

14. A copy of the record from the superior court establishing the will, and a copy of the will, both authenticated by the clerk of the county court, would entitle the will to be read. But, a certificate, under the seal of the county court, that a will was proved in the superior court, and afterwards ordered by the county court to be recorded, is not a sufficient attestation. *Ibid*.

15. The probate of a will ought to appear upon the minutes

of the county court, and the will itself ought to be recorded. *Sumner v. Roberts*, 2 Dev., 527.

16. Although the certificate of the clerk on the will itself has been commonly received as sufficient, yet if this certificate be made and signed by the deputy, it is not a legal probate, and the fact that the will is on the files of the court will not aid it. *Ibid.*

17. Where a will giving the executors power to sell land, and directing them to pay the interest of the personalty to a married woman for her life, and after her death to divide the whole and the rents of the land between her children, was propounded by the executors, and upon the *caveat* of her husband was rejected, the sentence is conclusive both upon her infant children then in being, and those born afterwards. *Redmond v. Collins*, 4 Dev., 430.

18. A mistake in a verdict in the county court, finding against a proposed will, without collusion between the executors and the caveator, is no reason for permitting it to be re-propounded by a legatee, although the result would have been different, if the executors had appealed. *Ibid.*

19. An erroneous verdict and sentence against a will cannot be set aside in a court of probate on that ground, except on an allegation and proof of newly discovered testimony. *Ibid.*

20. A sentence for or against a will is not binding on those who are not parties or privies. Privies are they who claim through a party, or who have notice of the proceedings. *Ibid.*

21. Probate in common form is where the next of kin have no notice; while in solemn form, they are cited to see the proceedings; and similar to the last is the intervention of the next of kin, though they are not cited. In none of these cases, can the sentence be re-examined at the instance of one who is a party or privy to it; and this privy may be shown *dehors* the record by proof *in pais*. *Ibid.*

22. Probate in common form may ordinarily be revoked at the instance of the next of kin; because its form implies that they are not privy to it; but this presumption may be repelled by lapse of time, or notice of a contest between the executor and another of the next of kin. *Ibid.*

23. Courts of probate act upon different principles in applications to revoke letters of administration and to repropound a will which has once been rejected; the latter being never done at the instance of the executor who formerly propounded it, except in cases of fraud, surprise or newly discovered testimony. *Ibid.*

24. A legatee may propound a will when the executor renounces. *Ibid.*

25. The executor is both *pars principalis*, and *legitimus contradictor*, and sentence against a will, *bona fide* propounded by him,

binds all persons interested under it, except under special circumstances, as for instance, collusion; and neither infancy, coverture, non-residence, nor that the legatee was not *in esse*, such a circumstance. *Ibid.*

26. It is probable that, in this state, a rejection of a will when offered *ex parte* by the executor would neither bind him nor a legatee; but it is otherwise of an issue formally made up between the executor and one of the next of kin, resulting in a sentence against the will. Our act of assembly does not alter the law in these respects, but only directs a trial by jury, and a new mode of proof. *Ibid.*

27. Devisees are not represented by the executor, and are not affected by a sentence against the will, when propounded by him, unless they are made parties to the proceeding, but they cannot repropound it and demand probate of it, as a will of lands as well as chattels; their remedy being to prove it in an action of ejectment for the devised premises, which may be done, when it has been rejected on the allegation of the executor, without notice to them. *Ibid.*

28. In an issue of *devisavit vel non*, the court cannot notice equitable interests in land devised in the will. It is sufficient if the devisee in trust is a party; and if, on the trial of that issue, the trustee betray the interest of the *cestui que trust*, the remedy of the latter is in equity. So when a power over the land is created by the will, the depository of the power is the only actor in the court of probate. And whenever the trustee or depository of a power is bound by the sentence of a court of probate, the *cestui que trust*, or the person interested under the power, is in that court also bound. *Ibid.*

29. A will written for a testator *in extremis*, by one standing in a confidential relation to him, and who takes a benefit under it, is not invalid as a conclusion of law, if it were read over to the testator, or its contents otherwise proved to have been known to him; but these facts must be left to the jury, and from them fraud must be inferred, unless repelled by proof of *bona fides*. *Downey v. Murphey*, 1 Dev. and Bat., 82.

30. Where the capacity of a testator is perfect, his knowledge of the contents of his will is presumed from the fact of execution. *Ibid.*

31. When, upon a petition in the county court for re-propounding an alleged will for probate, the court ordered the same to be re-propounded, and directed an issue, from the finding on which the petitioners appealed to the superior court, *it was held* that the appeal carried up the whole case, and that the superior court had power to revise the order for re-propounding the will, although the defendants had not appealed from that order. *Harvey v. Smith*, 1 Dev. and Bat., 186.

32. Where a petition for re-propounding a will for probate does

not state between whom the issue on the first attempt to prove it was joined, nor show whether the proper persons were parties to that issue, nor whether the executor acted *bona fide* or otherwise, so that the court cannot see whether the petitioners were or were not bound by the finding on that issue, the petition will be dismissed as uncertain, informal and defective, but without costs and without prejudice to the right of the petitioners to propound the same again, in proper form, before a competent tribunal. *Ibid.*

33. There is no authority for the probate of wills of married women, as devises of real estate. *Ibid.* (Such wills when made under a settlement, &c., may now be admitted to probate either in the county court, or in a court of equity. Rev. Code, ch. 119, sec. 3.)

34. *It seems* that a testamentary disposition of personal estate made by a *feme covert*, with the permission of her husband, may be admitted to probate. *Ibid.*

35. Upon an issue of *devisavit vel non*, it is not absolutely necessary, as a rule of law, to prove, besides capacity in the supposed testator and the formal execution of the paper, the further fact by distinct evidence, that the testator knew the contents of the instrument; for the jury may infer such knowledge from the evidence of capacity and execution. *Carr v. McCum*, 1 Dev. and Bat., 276.

36. The next of kin has a right to have the probate of a will, taken in common form, recalled, and the will proved *per testes*, unless after notice of the probate, he has been guilty of gross *laches*, or has long acquiesced in the probate sought to be vacated; and this, without making oath of recently discovered testimony to impeach the will. Neither is the receipt of a legacy under the will, nor a claim by a bill in equity of a trust in the whole estate under the will, such an acquiescence as will bar this right. *Ralston v. Telfair*, 1 Dev. and Bat., 482.

37. If an executor upon propounding a will for probate, cites, the next of kin to see proceedings, he will be barred by the probate. *Ibid.*

38. A copy of a will made in another state, with its probate certified by the judge of the court in which it was proved, and accompanied by the testimonial of the governor of that state, that the person, who gave the certificate, was the proper officer to take such probate and to certify it, is a sufficient authentication of the will, under the act of 1802, to authorize its reception as evidence in our courts. *Knight v. Wall*, 2 Dev. and Bat., 125. (See Rev. Code, ch. 44, sec. 9.)

39. The act of 1789, requiring a will when contested to be proved by all the attesting witnesses if to be found, is satisfied by proof of their handwriting, if they are out of the state, luna-

tic, or the like. *Bethell v. Moore*, 2 Dev. and Bat., 311. (See Rev. Code, ch. 119, sec. 15.)

40. Where there are three attesting witnesses, all of whom reside beyond the limits of the State, *it seems* that proof of the handwriting of two of them is sufficient to admit the will to probate. *Ibid.*

41. Where, upon a petition for the reprobate of an alleged will, it appeared that the instrument was attested by subscribing witnesses, but was not written or subscribed by the testator; that it disposed of the whole of the testator's estate from the next of kin in favor of a person who was present at the making; and that it was proved the day after it was made; *it was held* that the probate ought to be revoked; that the lapse of nine or ten years would not raise a presumption of acquiescence on the part of the next of kin, when it appeared that they were numerous and were much dispersed; and that several of them were infants and married women. *Gray v. Maer*, 3 Dev. and Bat., 47.

42. On a petition for the reprobate of an alleged will, if it appear that one of the dependants lives out of the State, notice by publication is sufficient as to him. *Ibid.*

43. Where there is any evidence of fraud or imposition in procuring the execution of an instrument as a will, the jurors are at liberty to consider the dispositions of property actually made therein, to guide their judgment in making up their verdict. But where capacity in the testator, formal execution and volition, all appear, no tribunal can pronounce against a will, because of its disapprobation, however strong, of the dispositions made by the testator. *Ross v. Christman*, 1 Ired., 209.

44. The probate of a will of lands by a married woman cannot be taken in the county court. She can only make an appointment in the nature of a will of real estate, under a power of appointment specially given in some instrument, and that appointment the courts of equity have alone the jurisdiction to determine on and enforce. *Newlin v. Freeman*, 1 Ired., 514. (Such wills, made under a power of appointment, may now be proved in the county court by the act of 1844, ch. 88. See Rev. Code, ch. 119, sec. 3.)

45. A married woman can, by her husband's consent, make a will of her personal property. And where he has covenanted in a marriage settlement, that she make such a will, but withholds his consent from the particular will she makes, this is still her will as to personalty, sufficient at least to repel his right of administration, and to authorize the grant of administration to her appointee, with the will annexed. And in such case, the appointment must be proved as a will in the county court, and then it is to be regarded in all courts as a will. *Ibid.*

46. Courts of probate are not, like courts of law, under an absolute inability to reform their judgments after they have been

rendered; and, therefore, application for relief against any of their judgments may be made to the courts in which they were rendered. But when the sentence of such a court has been regularly pronounced, it will not be set aside or vacated, except under such circumstances as would induce a court of equity to order a judgment at law to be set aside, and the matter to be retried. *Edwards v. Edwards*, 3 Ired. 82.

47. Where a will was offered by the executor for probate in the county court, and a *caveat* entered, and the jury found in favor of the caveators, upon which the executor was about to appeal but declined to do so upon the assurance of the caveators, that if the widow of the testator did not assent to certain terms they proposed, the verdict might be set aside, and a new trial had, and the widow refused her assent to the proposed terms, *it was held*, upon the petition of the widow, that the sentence of the county court against the will should be revoked, and the will re-propounded for probate. *Ibid.*

48. A general probate of a will, containing dispositions of realty as well as personalty, is presumed, if on its face the will purports to have been executed with the ceremonies necessary to pass lands, and unless something is shown to remove the presumption, to have been a probate of it both as to real and personal property. *Morgan v. Bass*, 3 Ired., 243.

49. In the case of an unattested will, when it appears from the record that the will was proved both as to real and personal estate, it must be intended that all the requirements to render an unattested will effectual for the devise of lands had been shown to the satisfaction of the court. But from a general probate of an unattested instrument as a will, such a legal inference does not arise. *Ibid.*

50. An instrument, which has once been proved as a will of personalty, may be subsequently propounded as a will of real estate. *Ibid.*

51. One who propounds a will for probate cannot suffer a *nonsuit*, nor withdraw the paper propounded. The proceeding of the court is one *in rem*, and the court is bound to give its sentence upon the paper itself—the *res*—without regard to particular persons, but always endeavoring to give proper notice to all persons interested. *St. John's Lodge v. Callender*, 4 Ired., 335.

52. Where an executor offered a will for probate in the county court, upon which an issue of *devisavit vel non* was made up and there tried, and afterwards an appeal was taken to the superior court, *it was held* that in the latter court the executor (who was not one of the subscribing witnesses) might by permission of the court renounce all right to the executorship and withdraw from the suit, one of the legatees in the will having intervened as a party and agreed to become responsible for all the costs, and that

the executor thereby became competent as a witness in support of the will. *Sawyer v. Dozier*, 5 Ired., 97.

53. The proceeding in relation to the probate of a will is a proceeding *in rem*, and every party in interest has a right to become a party in the cause at any time before the decision. *Ibid.*

54. An executor has an absolute right of refusal at any time before he undertakes the office, or intermeddles with the estate, and he does not definitively assume the office by propounding the will for probate. *Ibid.*

55. A will of personalty must be executed according to the law of the country where the domicil of the testator was at the time of his death; it is, therefore, most proper that such a will should be first submitted to the forum of the domicil at the time of the death, but that course is not absolutely necessary. *Hyman v. Gaskins*, 5 Ired., 267.

56. The court of probate in this state does not enquire into the validity of a will of personalty, proved in the state where the domicil was, but looks only to the probate, and thereupon grants letters of administration or letters testamentary, as the case may be. Or, perhaps, the probate had and letters granted in another state, duly authenticated according to the provisions of the constitution of the United States, may authorize the executor or administrator to sue in our courts. *Ibid.*

57. The county, in which there are *bona nabilia* of one who was domiciled abroad, is the proper county in which the probate of the will is to be had, or letters of administration granted. Therefore, where a testator had a domicil in Florida, at the time of his death, and had *bona nabilia* in the county of *TE* in this state, a probate of the original will, in the court of this county, and the grant of letters testamentary to the executor are not void. *Ibid.*

58. When the probate of a will has been had in another state, and is authenticated as the laws of the United States direct, it is in such an authentic form as to supersede the necessity of a probate in the courts of this state, and such an authentication may be given in evidence to sustain a suit. *Lancaster v. McBride*, 5 Ired., 421.

59. An issue to try the validity of a will is not an adversary suit, there being strictly no parties to it. *Enloe v. Sherrill*, 6 Ired. 212.

60. Where a will is propounded, if the executor decline to prove it, or if there be grounds for believing that the executor will not faithfully perform his duty, the court will permit any person, who is interested in supporting the will, to join with the executor, or to propound it alone. But the party applying for such an order must show that he is not a mere intruder, but that he either has, or believes he has, an interest in establishing the will. *Ibid.*

61. On the propounding of a will for probate, the issue may be framed specially, whether the paper writing, or any part of it, and if any part which part of it, was the last will and testament of the deceased. *Gash v. Johnson*, 6 Ired., 289.

62. A probate of a will in common form cannot be set aside on a petition for reprobate, without showing some reason why the former probate was wrong and should not have been allowed. Especially the court will not set aside a probate in common form, upon the petition of the widow, who admits that the will was properly proved, but desires a re-probate to enable her to enter her dissent within six months thereafter. *Armstrong v. Baker*, 9 Ired., 109.

63. The mere fact that all the parties interested in the estate of the deceased were not cited in the original probate is not, of itself, a sufficient ground for a re-probate. *Ibid.*

64. The propounder of a will of a married woman should properly file allegations in writing and on oath, setting forth the instrument or facts relied on, so as to put on the record such a case as would show that the paper propounded might be the will of the party deceased, notwithstanding her coverture. And, in like manner, the party contesting should put in his allegations in writing, pleading a former sentence as a bar to any further litigation, and, of course, to ordering another issue, or denying the existence of any alleged agreement, or of any right in the wife to bequeath. These are preliminary matters proper for the court to decide, and not matters for the jury. *Whitfield v. Hurst*, 9 Ired., 170.

65. A court of probate cannot construe a marriage settlement, so as to determine whether it vested a separate estate in the wife or not. But where a marriage agreement gives a color to the act of the wife in making a will, that is sufficient to induce a court of probate to admit the paper, leaving it to the court of equity ultimately to construe and enforce the articles and compel the execution of the will, if made, in the view of that court, under a sufficient authority, or by virtue of a sufficient estate in the wife. *Ibid.*

66. After an issue of *devisavit vel non* is submitted to a jury, there cannot be a definitive sentence upon a paper offered as a will, but upon the verdict of the jury, unless the issue is itself set aside. And after such an issue is made up, either party has a right to insist on a verdict. *Ibid.*

67. A petition to set aside the probate of a will, on the ground of the want of the citation of the next of kin, will not be granted for that cause alone, but merits must be shown, and it must appear that the former proceedings resulted wrongfully, and that the interests of the petitioners, if under disability themselves, were not properly defended by those who undertook to defend them. *McNorton v. Robeson*, 9 Ired., 256.

68. A petition to set aside the probate of a will, on the ground of newly discovered testimony, on points to which evidence was given at the probate of the will, will not be granted, unless such testimony not only repels the adversary's charge, but also destroys his proofs, by showing that the former verdict was obtained by surprise and perjury. *Ibid.*

69. It is sufficient evidence of the probate of a will to pass real estate, that it is certified by the clerk that "it was proved in open court by H. G., a subscribing witness, and recorded," when it appears on the face of the paper that there were two subscribing witnesses. *Harven v. Springs*, 10 Ired., 180.

70. A will is well attested by subscribing witnesses, when, though not in the same room with the testator, they are in such a situation that the testator either sees, or has it in his power to see, that they are subscribing, as witnesses, the same paper he had signed as his will. *Graham v. Graham*, 10 Ired., 219.

71. Where the supposed testator could only see the backs of the witnesses, but not the paper they were subscribing, *it was held* that the paper writing was not well attested as a will. *Ibid.*

72. In a controversy respecting the probate of a will, any person who is entitled in interest may become an actor. The course is to state on the record such matter as shows on which side the person becomes an actor, so as to show distinctly, whether he may, in the result, be entitled to, or liable for, the costs. *Benjamin v. Teel*, 11 Ired., 49.

73. In order to satisfy that part of the law, which requires the attestation of subscribing witnesses to a will to be *in the presence* of the testator, it is sufficient if the attestation be in the same room in which he is, provided it be not done in a clandestine, fraudulent way, for that would not be in the testator's presence. *Bynum v. Bynum*, 11 Ired., 632.

74. Where two persons agree to make mutual wills, *it would* seem that bad faith in the one, either in not making his will, or in cancelling it after it was made, will not prevent the probate of the will of the other party. *Ibid.*

75. The proceeding in probate causes is not similar to those at common law, for in its nature it is a proceeding *in rem*, to which there are no parties in the strict sense of the common law, and the court retains that exclusive power over the subject, which arises from the provision in the statute that the issue "is to be made up under the direction of the court." The court may modify the issue, both in respect of the scripts and parts of scripts, and of the position of the parties in interest, so as to have the contest upon the issue determined conclusively, and upon its merits as existing in fact. *Love v. Johnston*, 12 Ired., 355.

76. When one script only is put in issue, and that is but a part of the will, the verdict ought not to be against it altogether, but should, rather, be according to the truth, that it is a part.

Upon such a finding, the parties would be under the necessity of asking the court to set it aside, and remodel the issue, so as to embrace both scripts, and thus the whole case would be properly brought up. *Ibid.*

77. An acknowledgment made by the supposed testator in 1848 of a paper writing dated in 1830, as his will, is competent evidence to prove his execution thereof, as a will of personalty. *Kirby v. Kirby*, Busb., 454. (Wills of realty and personalty are now put upon the same footing. See Rev. Code, ch. 119.)

78. An entry on the minutes of the county court, as to a will which had two subscribing witnesses, as follows: "The will of R. B., proved by H. S., Executor, T. B. qualified," is sufficient to authorize the presumption that the will was duly proved, nothing appearing on the face of the proceedings to forbid such presumption. *Marshall v. Fisher*, 1 Jones, 111.

79. The dispositive character of a script, propounded for probate as a holograph will, can be proved by evidence *dehors* the paper. *Outlaw v. Hurdle*, 1 Jones, 150.

80. The character of the person propounding an instrument for probate cannot be considered in determining upon the genuineness of the instrument. *Ibid.*

81. The probate of wills in *common form*, being a temporary measure for the protection of estates, is not conclusive, and any person interested in the estate, either under the will, or as next of kin if the will should be set aside, may of common right institute proceedings to have a probate in *solemn form*, though this right may be forfeited by acquiescence in the probate in *common form*, or by an unreasonable delay. *Etheridge v. Corprew*, 3 Jones, 14.

82. Where more than ten years had elapsed from the death of the decedent to the filing of a petition for a probate in *solemn form*, and it appeared that for nearly all that time the petitioners had been under disabilities of coverture, absence beyond seas, residence in another State and lunacy, it was held that as it was not shown by those who sought to take advantage of the delay, at what time the petitioners had actual notice of the death of their kinsman and of the probate of his will, the petitioners were not barred of their right to have a re-probate in *solemn form*. *Ibid.*

83. In passing upon the question whether there should be a re-probate in *solemn form*, the court will not undertake to decide upon the validity of the alleged will. *Ibid.*

84. Whether another court can, in a collateral proceeding, review the decision of a county court, in regard to the sufficiency of the evidence to establish the execution of a script as a will of personalty, when the error appears on the face of the certificate of probate, *quære*. *Barwick v. Wood*, 3 Jones, 306.

85. The influence, which is sufficient to destroy the validity of a will, is a fraudulent influence which controls the mind of the testator, so as to induce him to make a will which he would not otherwise have made. *Marshall v. Flinn*, 4 Jones, 199.

86. Undue influence, in order to invalidate a will, must be proved to have been fraudulent and controlling, and even where the relation of client and attorney existed, such undue influence must be made to appear, by that and other facts of the case, and is not to be inferred as a mere matter of law from the existence of such a relation. *Wright v. Howe*, 7 Jones, 412.

87. A testamentary capacity is "a capacity to understand the nature of the act in which the testator was engaged and its full extents and effects." *Cornelius v. Cornelius*, 7 Jones, 593.

88. Where an alleged testator, in a script propounded as his will, devised and bequeathed certain property to the child of his housekeeper, a white woman, which child was proved to be a mulatto, but which the mother had induced him to believe was his, *it was held* that this was no evidence in support of the allegation that the will was obtained by fraud and undue influence. *Howell v. Troutman*, 8 Jones, 304.

89. Where the certificate to the probate of a will set forth that it was proved in common form by the oath of A, one of the subscribing witnesses, and then proceeded to state what the witness swore to, and there was no statement that he swore he subscribed the will as a witness in the presence of the testator, *it was held* that the probate was defective. *Leatherwood v. Boyd*, 1 Winst., 123.

See (Wills—Of attested wills.) (Wills—Of holograph wills.)

WITNESS.

See (Evidence—Witnesses, their competency or incompetency.) (Evidence—Subscribing witness, proof of handwriting.) (Evidence—Witnesses, their examination.) (Evidence—Competency of a witness restored by a release.) (Evidence—Impeaching the credibility of a witness.) (Evidence—In what cases a witness may express an opinion.) (Evidence—Witnesses, their liabilities.) (Evidence—Witnesses, their compensation and remedy therefor.)

WOODS.

1. The penalty for setting fire to the woods is incurred, unless two days notice is given to the owners of land adjoining. An agreement by one neighbor to take shorter notice will not bar a stranger from recovering under the acts of 1777 and 1782. *Wright v. Yarbrough*, N. C. Term, R., 263, (687.) (See Rev. Code, ch. 16, secs. 1 and 2.)

2. The acts of 1777 and 1782 do not apply to cases of burning the woods from necessity, but only to a voluntary firing. One, therefore, who sets fire to the woods by necessity, need not take "effectual" or any "care" to extinguish it, so far as the penalty inflicted by the statutes is concerned, though he may be liable to an action on the case, for the damages actually sustained by another. *Tyson v. Raspberry*, 1 Hawks, 60. (See Rev. Code, ch. 16.)

3. Where one was clearing land which he had enclosed, and in burning the log heaps, the fire communicated to his wood land some twenty-five or thirty yards distant, and thence to the land of the plaintiff, *it was held* that he was not setting fire to his woods within the meaning of the act. *Averitt v. Murrell*, 4 Jones, 322.

4. An old field, around which the fences had gone to decay, and which had grown up in broom sedge and pine bushes, five or six feet high, and which is surrounded by forest land, is "woods" within the meaning of the Rev. Code, ch. 16, sec 1, and the setting it on fire, contrary to the provisions of the act, makes the person liable to the penalty therein prescribed. *Hall v. Crawford*, 5 Jones, 3.

5. In an action on the case under the act, Rev. Code, ch. 16, sec. 2, for an injury to adjoining lands caused by a person's setting fire to his own woods, without a notice in writing, *it was held* that the proof of a waiver of a written notice was an answer to the action. *Roberson v. Kirby*, 7 Jones, 477.

See (Action on the case—When the action will, or will not, lie, 31.)

WRECKS.

1. Under the wreck laws, the master, owner, merchant or consignee of wrecked vessels, or other property, has a right to take possession of them and dispose of them as he may think proper,

without any responsibility to the wreck master for commissions, or in any other respect. *Etheridge v. Jones*, 8 Ired., 100. (See Rev. Code, ch. 120, secs. 5, and following.)

2. A person, who purchases goods at a wreck sale, has a right to take them away by the most convenient route, though in doing so he has to pass over the land of another, who has forbidden him to enter or cross his land for that purpose. *Hetfield v. Baum*, 13 Ired., 394.

3. In such a case, though the land has been granted by the State, a right of way is reserved from necessity. *Ibid.*

NAMES

OF THE

CASES AT LAW,

REPORTED AND TO BE FOUND

IN THIS DIGEST.

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ERRATA TO VOL II.

- Page 690, line 9 from top, for *Love* read *Lane*.
 " 695, line 13 from bottom, after *Indictment* insert *Form*.
 " 712, line 16 from bottom, for *his* read *her*.
 " 723, line 3 from top, for "256" read "246."
 " 729, line 6 from top, for *trade* read *trader*.
 " 735, line 2 from top, for "381" read "384."
 " 745, line 19 from top for "257" read "251."
 " 748, line 22 from top for *Pope* read *Page*.
 " 759, line 22 from top, for "269" read "369."
 " 766, line 24 from top for "608" read "508."
 " 766, line 2 from bottom, for *committed* read *convicted*.
 " 780, line 24 from bottom, strike out *if*.
 " 793, line 4 from top, for *Harley* read *Farley*.
 " 796, line 6 from bottom, for *Lowe* read *Towe*.
 " 798, line 15 from bottom, for *prest* read *present*.
 " 800, line 13 from top, for *Downs* read *Danns*.
 " 816, line 6 from top for *is* read *his*.
 " 825, line 7 from bottom, strike out *not*.
 " 827, line 14 from bottom, for *Higgins* read *Huggins*.
 " 865, line 16 from top, for *Jones* read *Jomes*.
 " 881, line 16 from bottom, for "133" read "113."
 " 892, line 4 from top, for "34" read "343."
 " 897, line 19 from bottom, strike out *on*.
 " 901, line 19 from top, for "246(223)" read "(446(331))"
 " 917, line 2 from bottom, for *money* read *many*.
 " 917, bottom line, for *many* read *money*.
 " 925, line 2 from bottom, after *opposite* insert *party*.
 " 926, line 3 from bottom, after *it* insert *was*.
 " 930, line 22 from bottom, for *Martin* read *Mastin*.
 " 945, line 13 from bottom, for *Shaver* read *Weaver*.
 " 963, line 8 from bottom, for *State* read *Governor*.
 " 965, line 16 from top for *the* read *their*.
 " 968, line 6 from bottom, for *endorse* read *endorser*.
 " 972, line 9 from top, for "7 Ired.," read "9 Ired."
 " 996, line 12 from bottom, for *Murph.* read "3 Murph."
 " 1020, line 18 from bottom, for *no* read *an*.
 " 1022, line 16 from top, after *can* insert *not*.
 " 1052, line 2 from top, for *Holden* read *Holton*.
 " 1058, line 18 from top, for *Benberry v. Collins* read *Collins v. Benberry*.
 " 1060, line 5 from top, for (*Militia 21*) read (*Militia 2*.)
 " 1069, line 24 from top, for *builders* read *bidders*.
 " 1076, line 18 from top, for "468" read "461."
 " 1087, line 23 from top, after *debtor* insert *Ibid*.
 " 1088, line 5 from bottom, for *on* read *own*.
 " 1115, top line, for *State* read *Stade*.
 " 1122, line 3 from top, for *leave* read *lease*.
 " 1127, line 13 from bottom, for *Hours* read *Hawks*.
 " 1133, line 17 from bottom, insert *ibid* after *declaration*.
 " 1136, line 3 from bottom, for *vendoe* read *vendee*.
 " 1196, line 3 from top, after *inesse* insert *is*.

